U.S. POLICY AND PROGRAMS IN CAMBODIA

HEARINGS
BEFORE THE
SUBCOMMITTEE ON
ASIAN AND PACIFIC AFFAIRS
OF THE
COMMITTEE ON FOREIGN AFFAIRS
HOUSE OF REPRESENTATIVES
NINETY-THIRD CONGRESS
FIRST SESSION

MAY 9, 10; JUNE 6, 7, 1973

Printed for the use of the Committee on Foreign Affairs

FROM THE LIBRARY OF

Douglas Pike

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973
COMMITTEE ON FOREIGN AFFAIRS

THOMAS E. MORGAN, Pennsylvania, Chairman

CLEMENT J. ZABLOCKI, Wisconsin
WAYNE L. HAYES, Ohio
L. H. FOUNTAIN, North Carolina
DANTE B. FASCCELL, Florida
CHARLES C. DIGGS, Jr., Michigan
ROBERT N. C. NIX, Pennsylvania
DONALD M. FRASER, Minnesota
BENJAMIN S. ROSENTHAL, New York
JOHN C. CULVER, Iowa
LEE H. HAMILTON, Indiana
ABRAHAM KAZEN, Jr., Texas
LESTER L. WOLFF, New York
JONATHAN B. BINGHAM, New York
GUS YATROW, Pennsylvania
ROY A. TAYLOR, North Carolina
JOHN W. DAVIS, Georgia
OGDEN R. REID, New York
MICHAEL HARRINGTON, Massachusetts
LEO J. RYAN, California
CHARLES WILSON, Texas
DONALD W. RIEGLE, Jr., Michigan

WILLIAM S. MAILLIARD, California
PETER H. B. FRELINGHUYSEN, New Jersey
WILLIAM S. BROOMEFIELD, Michigan
H. R. GROSS, Iowa
EDWARD J. DERWINSKI, Illinois
VERNON W. THOMSON, Wisconsin
PAUL FINDLEY, Illinois
JOHN H. BUCHANAN, Jr., Alabama
J. HERBERT BURKE, Florida
GUY VANDER JAAGT, Michigan
ROBERT H. STEELE, Connecticut
PIERRE S. DU PONT, Delaware
CHARLES W. WHALEN, Jr., Ohio
ROBERT B. BOH MATHIAS, California
EDWARD G. RISTER, Jr., Pennsylvania
LARRY WINN, Jr., Kansas
BENJAMIN A. GILMAN, New York
TENNYSON GUYER, Ohio

MARIAN A. CZARNECKI, Chief of Staff

Subcommittee on Asian and Pacific Affairs

ROBERT N. C. NIX, Pennsylvania, Chairman

LEE H. HAMILTON, Indiana
LESTER L. WOLFF, New York
JOHN W. DAVIS, Georgia
ROY A. TAYLOR, North Carolina
LEO J. RYAN, California
DONALD W. RIEGLE, Jr., Michigan

WILLIAM S. BROOMEFIELD, Michigan
VERNON W. THOMSON, Wisconsin
J. HERBERT BURKE, Florida
PIERRE S. DU PONT, Delaware
TENNYSON GUYER, Ohio

THOMAS B. KENNEDY, Subcommittee Staff Consultant
DONNA GAIL WYNN, Staff Assistant
CONTENTS

LIST OF WITNESSES

Wednesday, May 9, 1973:

Hummel, Hon. Arthur W., Jr., Deputy Acting Assistant Secretary for East Asian and Pacific Affairs, Department of State

Doolin, Dennis J., Deputy Assistant Secretary of Defense (International Security Affairs), Department of Defense

Brower, Charles, Acting Legal Adviser, Department of State

Nooter, Robert H., Assistant Administrator, Agency for International Development

Miller, Charles, professor of constitutional law, George Washington University, and consultant to Senator Sam Ervin, Subcommittee on Constitutional Rights

Thursday, May 10, 1973:

Goldwater, Hon. Barry, a U.S. Senator from Arizona

Bingham, Hon. Jonathan B., a Representative in Congress from New York

Alzug, Hon. Beila S., a Representative in Congress from New York

McCloskey, Hon. Paul N., Jr., a Representative in Congress from California

Warmke, Hon. Paul C., former Assistant Secretary for International Security Affairs, Department of Defense

Charles, Abram, professor of law, Harvard University, former Legal Adviser, Department of State

Wednesday, June 6, 1973:

Adams, Samuel A., former employee of the Central Intelligence Agency and experienced analyst in Southeast Asian Affairs

Bennett, Hon. Charles E., a Representative in Congress from the State of Florida

Thursday, June 7, 1973:

Adams, Samuel A., former employee of the Central Intelligence Agency and experienced analyst in Southeast Asian Affairs

Hummel, Hon. Arthur W., Jr., Acting Assistant Secretary, Bureau of East Asian and Pacific Affairs, Department of State

Nooter, Hon. Robert H., Assistant Administrator, Bureau for Supporting Assistance, Agency for International Development

MATERIAL SUBMITTED FOR THE RECORD

Letter from Senator Barry S. Goldwater


Statement of Alfred D. White, Deputy Assistant Administrator, Bureau for Asia, Agency for International Development

APPENDIX

Article from Commentary, July 1972, entitled "The Constitution and the War," by Alexander M. Bickel

Letter from Eugene V. Rostow, professor of law, Yale University Law School

Correspondence from Alfred P. Rubin, professor of law, University of Oregon

Publication submitted by Alfred P. Rubin, reprinted from the International and Comparative Law Quarterly, July 1971, entitled "SEATO and American Legal Obligations Concerning Laos and Cambodia"

(III)
| Letter from Charles B. Nutting, professor of law, University of California | Hastings College of the Law | 143 |
| Letter from Dean Rusk, professor of law, University of Georgia School of Law | 144 |
| Letter from Clark M. Clifford, attorney | 146 |
| Letter from William W. Van Alstyne, professor of law | 147 |
| Letter from Richard B. Lillich, professor of law, University of Virginia | 148 |
There was at least 100,000 phantom soldiers carried in Cambodian pay records. The entire army is approximately 140,000 active men.

Insurgent forces number from 40,000 to 60,000. They are divided into numerous factions, so much so it is claimed that the Lon Nol government cannot find responsible individuals to negotiate with. This has not decreased their fighting ability in comparison to the Cambodian Army.
It is fair to say that our bombing is a crutch to the Cambodian Army but as such has not halted the enemy advance.

The cost of such bombing approaches exceeding $4½ million a day on the average and has been going on since February. These costs included gasoline and ammunition, of course. That would bring total costs to over $250 million.

While all of this is difficult enough we have the basic problem that the bombing is being done under a constitutional cloud which has not been diminished by official statements.

In this case none of the usual constitutional props exist for Presidential military action. That is, American troops are not present in the theater of operations. American lives and property are not in any serious or special danger. The Tonkin Gulf resolution which purported to authorize Presidential military action in Southeast Asia was repealed in 1971.

The SEATO agreement authorized consultation between member states. The remaining active governments in SEATO, Thailand and the Philippines, have not asked for our assistance in Cambodia. Cambodia is a protocol state, not a member as such of SEATO and has proclaimed its neutrality.

The truce agreement itself makes provision for the enforcement of the terms of the truce. These provisions require unanimous action even to take up problems for investigation—in my opinion truly a dead end at work.

There is in fact no document that we can point to which authorizes military action by the President to enforce the Truce agreement. We must find out if there are secret agreements with the enemy, or if the true agreement is not our whole understanding. We must learn the President's authority to carry out this bombing action. If there are in fact no strings which inhibit a President from acting in this situation, there may be no barriers to such action in the future. Congress may then have to act and act as swiftly as possible to end what is considered by many as an intolerable situation.

Now, gentlemen, you are welcomed to this subcommittee. Will you say who wishes to speak first.

STATEMENT OF HON. ARTHUR W. HUMMEL, JR., ACTING ASSISTANT SECRETARY FOR EAST ASIAN AND PACIFIC AFFAIRS, DEPARTMENT OF STATE

Mr. Hummel. Mr. Chairman, I would like to speak first.

You have introduced a very large number of topics and a number of criticisms of the Khmer Government, some of which we, I think, would like to deal with.

Mr. Nix. Do you have a statement?

Mr. Hummel. Mr. Chairman, it was my understanding that you wished to have our statements inserted in the record and not necessarily read because of press of time.

Mr. Nix. That is correct, and without objection it is so ordered.

Mr. Hummel. There is a statement from myself and a statement also by Mr. Nooter of AID.

[The written statements follow:]
STATEMENT OF HON. ARTHUR W. HUMMEL, JR., DEPUTY ASSISTANT SECRETARY FOR ASIAN AND PACIFIC AFFAIRS, DEPARTMENT OF STATE

Mr. Chairman and Members of this Committee: I am privileged to appear before this Committee to discuss Cambodia and the U.S. position with respect to the situation presently existing therein.

As you will recall, hostilities in Cambodia erupted in the spring of 1970 when the North Vietnamese/Viet Cong moved out of their sanctuaries within Cambodia along the South Vietnamese border and attacked to the west. At that time, the Khmer Government launched a world-wide appeal to all UN members for assistance in defending itself against foreign aggression. A number of countries, including the U.S., responded. Our primary interest at that time, which continues today, was based not only on assisting a small country to resist aggression but even more in the solution of the Vietnam war which, in turn, overflowed into neighboring states of Laos and Cambodia.

Since that time, the military situation has ebbed and flowed with neither side achieving a clear-cut decision. Economically, the situation has been serious but has been kept under quite successful control through international, including U.S., and Khmer efforts which Mr. Nooter here will discuss later. Politically, the country has altered its type of government from that of a kingdom to a republic. It has managed, despite the war, to hold presidential and National Assembly elections and has carried out its international obligations as a member of the UN and its subsidiary organizations.

As has been the case militarily, so has the political situation varied from time to time. Most recently, there has been increasing pressure on the government of the Khmer Republic because of alleged corruption, increasing inflation and the narrowing of governmental authority. As a result, the Khmer government has in the past two weeks set up a “High Political Council” of four of the most prominent Khmer leaders, including President Lon Nol, and is in the process of forming a new cabinet. These moves are intended to broaden the base of the government, to rekindle popular support and eventually provide unity for negotiations aimed at achieving peace in Cambodia.

Concomitant with the entry into effect of the Vietnam ceasefire agreement, President Lon Nol announced a unilateral ceasefire. He did this deliberately in the hopes that it would produce a favorable response from the Khmer insurgents and the North Vietnamese/Viet Cong. At Lon Nol’s request, we also ceased all combat air operations. Regrettably, after about a week, the enemy gave its response in renewed attacks which have raised the level of military activity to its highest pitch ever. The Khmer government, therefore, requested renewed U.S. air support which we have given. As a result of the increased enemy attacks, the Khmer have suffered heavy casualties, including civilian ones caused by indiscriminate rocketing. A recent example was the attack against the Phnom Penh suburb of Pochentong, reportedly by a North Vietnamese rocket team, which caused 19 dead and 62 wounded. The Khmer government has also attempted to establish contacts with local insurgent leaders, has publicly offered amnesty and alluded to further concessions once negotiations were started. Here again, the enemy response has been negative and has included threats of death against the Khmer leadership.

Many questions have been asked in recent weeks concerning the U.S. role in this country and the need for our interest in it. As the Secretary of State and other government leaders have clearly pointed out, we believe strongly that the problems of Indochina as a whole cannot be resolved, unless peace is achieved in all three of its components. It is evident that the ceasefire agreement so long sought and at last achieved in Vietnam will be in jeopardy, if similar situations cannot be achieved in Laos and Cambodia. In the former, a ceasefire was reached a month after that in Vietnam. However, Cambodia remains at war and our continued assistance to it is designed to assist it to find a peace which will not only allow the Khmer to resolve its own problems but will protect the Vietnam ceasefire which offers an alternative to continued death and destruction for the South Vietnamese.

Much has been made of US bombing in Cambodia and particularly that its alleged indiscriminate character produces massive civilian casualties. I believe that Mr. Doolin from the Department of Defense can better address himself to these questions. However, I would point out that targets specifically do not include populated areas and that the diligent questioning of refugees in Phnom Penh and other cities nearby by Embassy officers has failed to turn up any evi-
dence that US bombing has been solely or even significantly responsible for civilian casualties or refugees. This is not to say that there have been none, but I believe they have been minimal under the circumstances.

Mr. Chairman, I have tried to trace a brief perspective of the situation in Cambodia and to reply to a few of the doubts held by some regarding US interests and activities in Cambodia. Our objective in Cambodia is to enhance the prospects that the Cambodians will negotiate a ceasefire and a return to peace as a solution to that war, as a vital part of the entire Indochina problem and as a contribution to regional stability and progress in Southeast Asia. Our economic and military assistance is designed to this end.

STATEMENT OF HON. ROBERT H. NOOTER, ASSISTANT ADMINISTRATOR, BUREAU FOR SUPPORTING ASSISTANCE, AGENCY FOR INTERNATIONAL DEVELOPMENT

Mr. Chairman and Members of this Committee: It is a privilege to appear before you to discuss our program in Cambodia.

First of all, I think it might be useful to give you a brief summary of how the economic aid program in Cambodia began in 1971.

In March of 1970, following the deposition of Sihanouk, the North Vietnamese opened hostilities against the Cambodian Government. Their enemy's military actions seriously affected the country's commerce and, in the summer of 1970, Cambodia asked the United States to resume economic assistance.

Prior to the war Cambodia was in relatively good economic shape. Export earnings, together with tourism, loans, and aid, were enough to pay for the country's imports of $100 to $120 million a year. Foreign exchange reserves were about $85 million. By 1971, however, as a consequence of the war, there was a precipitous drop in Cambodia's export earnings. The Government drew down its foreign exchange reserves in order to finance imports and used up its prewar stockpile of commodities.

With almost no exports, the country was unable to continue financing imports needed to sustain the economy. Agricultural production, particularly rice, fell sharply because of territorial losses and labor shortages resulting from the military buildup. The major rubber plantations curtailed or ceased operations. Industrial production also fell because of raw material shortages, manpower diversions, and war damage. Tourism virtually disappeared.

At the same time rapid expansion of the Cambodian armed forces, which before 1970 was only a 35,000-man largely ceremonial force, and the burden of armed conflict resulted in a drastic increase in Cambodian budget expenditures.

In formulating our initial economic aid program, we analyzed available data, including prewar import patterns, military force levels, and the impact of hostilities on agricultural and industrial production and transportation. Based on this analysis, we developed an aid framework geared primarily to supplying commodity imports needed to meet real resource needs rather than to combat inflation. We decided that the number of AID employees administering the program would be kept small; that we would not, at least for the present, initiate technical or capital assistance projects; that we would not have a separate AID mission in Phnom Penh; and that we would try to develop and maintain a procurement system that minimized the need for U.S. and Cambodian Government administrative controls.

We asked Congress to approve a $70 million Commodity Import Program in FY 1971. This program was initiated in March 1971. Following the advice of the International Monetary Fund the Cambodian Government acted courageously to implement a number of important self-help measures including adoption of a flexible exchange rate system, simplification of the import licensing mechanisms, increased import taxes, and higher interest rates. Parallel with these reforms, and in an effort to reduce the continuing drain on Cambodian reserves, we made a $20 million cash grant to the Cambodian Government in October 1971. We have since replenished the Commodity Import Program from time to time with additional resources.

Cambodia has also received, under a PL 480 sales program, substantial amounts of agricultural commodities, including cotton, wheat, and rice. PL 480 sales will be about $30 million in FY 1972.

As part of the stabilization effort, a multilateral Exchange Support Fund of $35 million was established in 1972 on the advice and with the assistance of the IMF. This Fund was established in recognition of the fact that not all of the
country's foreign exchange needs could be met through the tied procurement procedures of the Commodity Import Program. Donor contributions are made available on an untied basis at a level worked out by the IMF. The Fund has been an effective mechanism for enabling Cambodia to secure outside assistance in helping to meet part of the country's foreign exchange needs. Contributors include Japan, Australia, the United Kingdom, Thailand, New Zealand, and Malaysia, besides the United States and Cambodia itself.

Now, having said that, what has our aid program accomplished? First, U.S. economic aid to Cambodia has been, and still is, essential for the survival of the Cambodian economy in time of war. We finance food and other imports required to keep the economy going, some of which replace domestic production lost as a consequence of the war. Equally important, these imports are essential to forestall a serious deterioration in the living standard of the Cambodian people. Cambodia has never been a rich country, with prewar per capita income estimated at $111, and without U.S. assistance the lot of the average Cambodian would have been a sad one indeed.

As U.S. and other economic aid programs have gotten underway, imports have resumed and are about $115 million annually, a level which should sustain the economy. Foreign aid has financed only the import needs, not the domestic budget deficit.

In order to finance the budget for the expansion of its military forces, the Government has had to borrow from its Central Bank. The amount of such deficit financing which the Government has used for the military buildup has been greater than the stabilization impact of foreign aid. The country, as a consequence, has seen substantial monetary expansion and inflation. In 1971, monetary expansion was 50 percent, and close to that in 1972. Inflation has been somewhat erratic, prices rising early in the war during 1970, then lagging behind the rate of monetary increase, but again recently price increases have accelerated.

The Khmer Government's role in economic policy has always been of cardinal importance. Provision of economic assistance presupposed the Khmer Government would take the measures that were necessary to maximize the usefulness of that assistance and, in addition, use its own foreign resources as well as seeking international support. Monetary and fiscal policies were to be the primary tools for controlling the allocation of resources and the rate of inflation.

Given the situation it faced, the Cambodian Government has done well, particularly for a country which moved so swiftly from tranquility to war. The Khmer Government has generally followed a realistic exchange rate policy, even though that has required continuous devaluation as the rate of inflation continued.

Recently, we have also begun a program of direct assistance to refugees and war victims. Until 1972, Cambodia was able to meet the most pressing needs of its refugees, most of whom found housing with other members of their families or friends, and the Khmer Government did not seek additional outside aid. Last year, however, the continuation of hostilities led to an increasing number of persons who were not able to find employment or otherwise provide for themselves. This was particularly true of the 10,000 persons in Government refugee camps, most of whom were women, children, and old people.

On August 10, 1972, the Cambodian Government first requested U.S. assistance to refugees. We dispatched a team to review the situation and to determine what forms of U.S. assistance would be the most helpful in keeping with U.S. policy and legislative restraints regarding personnel limitations. The team confirmed that there were real needs to be met, with the most urgent requirement for relatively small amounts of assistance to those refugee families living in camps. The team recommended that assistance be provided through the United Nations or through private voluntary organizations in order to keep direct U.S. involvement to a minimum.

Since that time, AID has given several grants to private organizations interested in and able to assist Cambodia's refugees. The first of these grants, for $50,000, was made in December 1972 to the International Red Cross (ICRC) to provide food, clothing, medical care, and other assistance. In April, we gave an additional $100,000 to the ICRC. More recently, we made grants for $560,000 each to the Catholic Relief Services (CRS) and to Cooperative for American Relief Everywhere (CAFR). These grants will provide medical care, food, assistance in resettlement, and, when security conditions permit, goods and credit facilities to finance resumption of farm activities.

Regarding future aid requirements, the longer-term objective of U.S. policy is to achieve a negotiated cease-fire and a return to peace. While prospects for
peace are uncertain, it is the U.S. Government's hope and intention that a cease-fire will be achieved and that soon our assistance will be directed to a post-war situation. First priority will be relief for war-displaced persons. We will seek, primarily through additional grants to private and international organizations, to provide medical care, assistance in resettlement, food, credit facilities to finance resumption of farm operations, seeds and tools, and housing materials.

In terms of longer-range reconstruction and development requirements, the economic outlook for Cambodia is fair. With a settlement or a subsiding of hostilities, commerce would resume its normal pattern and domestic production and exports should approach prewar levels. Manpower would be released from military service and return to domestic agricultural and industrial pursuits. Cambodian agricultural exports should be reasonably competitive and commercially attractive, and tourism to Angkor Wat should again become an important source of foreign exchange.

While the need for aid to finance essential consumption imports should gradually decline, there will be a requirement for extensive aid in the private sector to assist industry and in the public sector to restore transportation and infrastructure. Some of this aid should be forthcoming from international and regional aid organizations. Indeed, the international framework for increased assistance is already in place in the form of the Exchange Support Fund. There are also bilateral aid programs in Cambodia. Japan, for instance, has given substantial amounts of rice and humanitarian relief, principally through its Red Cross. Other countries, the UN Development Program, the Mekong Committee, and the Asian Development Bank are also helping Cambodia with technical assistance or loans.

It is our expectation that these existing multilateral aid arrangements can be expanded to assist in Cambodia's longer-range development. Other countries have indicated their desire to provide additional assistance, particularly in humanitarian and reconstruction aid. The U.S. should also stand prepared to provide assistance which will help Cambodia move toward economic self-sufficiency when peace is restored there.

Attachments.
1. AID and PL 480 obligations for Cambodia, by fiscal year.

<table>
<thead>
<tr>
<th>ATTACHMENT 1</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cambodia AID and PL 480 obligations</strong></td>
</tr>
<tr>
<td>Fiscal year 1971:</td>
</tr>
<tr>
<td>Reimbursable import agreement</td>
</tr>
<tr>
<td>Commodity import program (CIP)</td>
</tr>
<tr>
<td>Total S.A</td>
</tr>
<tr>
<td>Public Law 480</td>
</tr>
<tr>
<td>Fiscal year 1972:</td>
</tr>
<tr>
<td>Cash grant</td>
</tr>
<tr>
<td>CIP</td>
</tr>
<tr>
<td>Subtotal</td>
</tr>
<tr>
<td>Technical support</td>
</tr>
<tr>
<td>Total S.A</td>
</tr>
<tr>
<td>Public Law 480</td>
</tr>
<tr>
<td>Fiscal year 1973:</td>
</tr>
<tr>
<td>CIP</td>
</tr>
<tr>
<td>Exchange support fund</td>
</tr>
<tr>
<td>Refugees</td>
</tr>
<tr>
<td>Subtotal</td>
</tr>
<tr>
<td>Technical support</td>
</tr>
<tr>
<td>Total S.A</td>
</tr>
<tr>
<td>Public Law 480</td>
</tr>
</tbody>
</table>

1 Agreements.
Mr. Nix introduce the others at this time accompanying you.

Mr. Hummel, I am Arthur Hummel, Jr., Acting Assistant Secretary of the East Asian Bureau in the Department of State.

Mr. Doolin, Dennis J. Doolin, Deputy Assistant Secretary of Defense, East Asia and Pacific Affairs.

Mr. Brower, Mr. Chairman, I am Charles N. Brower. I am acting legal adviser of the Department of State.

Mr. Miller, Mr. Chairman, I am Prof. Arthur S. Miller of the George Washington University Law Center.

Mr. Nooter, Robert N. Nooter, Assistant Administrator for AID.

Mr. Nix, Thank you.

Mr. Hummel.

Mr. Hummel. As I was saying, Mr. Chairman, you have introduced a large number of topics, a few of which I would like to address at this point and perhaps other witnesses would like to address others.

You mentioned initially, sir, that press briefings by the American Embassy of American newspapermen in Phnom Penh have been suspended. This is not the case. The regular weekly scheduled briefings that were an unusual factor of the Embassy’s activities because they very seldom take place in other missions, have in fact been suspended, but newspapermen are regularly being received in the American Embassy on an individual basis. There has not been a cutoff in the normal and legitimate contacts between American and other newspapermen on the one hand and Embassy officials on the other.

You mentioned, sir, that the North Vietnamese are reported not to be involved in the attacks in the Phnom Penh area. This, sir, is not accurate. The recent rocketing of Pochentong Airfield, the commercial and military airport at Phnom Penh, was conducted by a North Vietnamese Rocket Unit and not so incidentally resulted in a large number of civilian casualties recently. There are other North Vietnamese units who man the artillery as well as the rocket units, who are cadre in the Khmer insurgent groups, and who man the logistics apparatus that stretches all the way through Cambodia and to Vietnam without which the insurgents could not operate.

You mentioned, sir, that Cambodia has proclaimed its neutrality. You mentioned this in the context of the SEATO agreement in which Cambodia has been listed as a protocol state. You are quite correct in saying that. The previous Sihanouk Government of Cambodia announced that it did not wish to have Cambodia considered under any SEATO umbrella and Lon Nol’s present government, the Khmer Republic, also has made this plain as well. What the Cambodians want is
neutrality and more specifically a return to the terms of the 1954 Geneva accords that relate to all of Vietnam, and it is in this context that I would like to wind up my remarks.

What we wish, what the United States wishes, what the American objective is in Cambodia is precisely to see the neutrality of Cambodia preserved, the neutrality that you mentioned and the neutrality that all Khmer Governments in recent years have sought for, hopefully based on the 1954 accords. To withhold American assistance in terms of money, in terms of military support which is thoroughly consonant with the terms of the Vietnam agreement—to withhold this support would not of course result in the neutrality that we all seek for Cambodia and in fact would result in just the reverse.

Our objectives are limited. We have no commitments to Cambodia, secret or otherwise. We are attempting to support the Cambodian Government in its own legitimate aspirations and the legal rationale therefore has been given a number of times, most recently by the Secretary of State, for the American activities. I cannot myself speak to the legal rationale, another of your witnesses can; but I would stress, sir, that our objectives are limited, that we have no intention of introducing ground forces into Cambodia.

We will not introduce ground forces into Cambodia; we have none there now. There is a ceiling, legislatively applied, of 200 persons, American officials who may be in Cambodia at any one time, and that ceiling is scrupulously observed. There are other legislative restrictions that are also scrupulously observed against having American advisers for Cambodian military units.

In summary, sir, the actions we are taking we believe are thoroughly justified in law and in terms of foreign policy objectives and are directed toward a very limited goal and do not represent in any way a desire to widen the scope of the war but on the contrary are directed toward the achievement of a viable cease-fire, of a viable peace throughout Indochina, the achievement of which could not be accomplished if Cambodia were allowed to fall into North Vietnamese hands as a result of American inaction.

Mr. Nix. You say that our objectives are limited. You will concede, I suppose, that we are spending $41½ million per day in these operations, will you not?

Mr. Hummel. If I may, sir, I would like to ask Mr. Doolin of the Defense Department to address that question.

STATEMENT OF DENNIS J. DOOLIN, DEPUTY ASSISTANT SECRETARY OF DEFENSE, EAST ASIAN AND PACIFIC AFFAIRS

Mr. Doolin. Mr. Chairman, I have not divided it out on the daily basis but the cost of our bombing effort in Cambodia during the period January 27 through April 30, of this year is $160 million.

Mr. Nix. The next question I would put to you, Mr. Hummel, is by what authority, constitutional or otherwise, are we taking the action that we are engaged in?

Mr. Hummel. If I may, Mr. Chairman, the acting legal adviser of the Department of State has addressed this question before other forums, and is here today, I believe, for this purpose.
STATEMENT OF CHARLES BROWER, ACTING LEGAL ADVISER, DEPARTMENT OF STATE

Mr. Brower. Would you like me to address myself to that point, Mr. Chairman?

Mr. Nix. I would be delighted if you would.

Mr. Brower. Mr. Chairman, as we are all aware, there has been much speculation in the press, and much discussion in Congress, with respect to the constitutional authority of the President of the United States to authorize bombing and other air strikes in and over the territory of Cambodia. The definitive statement on this point by the administration was given by Secretary of State Rogers on April 30 as part of his testimony before the Senate Committee on Foreign Relations, and I would suggest that for the sake of completeness the record of these hearings include that memorandum. If you should like, Mr. Chairman, I have a copy of the memorandum available for that purpose.

Mr. Nix. Without objection the article referred to may be made a part of the record at this point in the record.

[The material referred to follows:]

PRESIDENTIAL AUTHORITY TO CONTINUE U.S. AIR COMBAT OPERATIONS IN CAMBODIA

The purpose of this memorandum is to discuss the President's legal authority to continue United States air combat operations in Cambodia since the conclusion of the Agreement on Ending the War and Restoring Peace in Vietnam on January 27, 1973 and the completion on March 28, 1973 of the withdrawal of United States armed forces from Vietnam and the return of American citizens held prisoner in Indochina. The memorandum also discusses the background of the Agreement of January 27 and the purposes of various United States actions in order to clarify the legal issues.

For many years the United States has pursued a combination of diplomatic and military efforts to bring about a just peace in Vietnam. These efforts were successful in strengthening the self-defense capabilities of the armed forces of the Republic of Vietnam and in bringing about serious negotiations which culminated in the Agreement on Ending the War and Restoring Peace in Vietnam, signed at Paris on January 27, 1973. This Agreement provided for a cease-fire in Vietnam, the return of prisoners, and the withdrawal of United States and allied armed forces from South Vietnam within sixty days. The Agreement (in Article 20) also required the withdrawal of all foreign armed forces from Laos and Cambodia and obligated the parties to refrain from using the territory of Cambodia and Laos to encroach on the sovereignty and security of other countries, to respect the neutrality of Cambodia and Laos, and to avoid any interference in the internal affairs of those two countries. This Article is of central importance as it has long been apparent that the conflicts in Laos and Cambodia...
are closely related to the conflict in Vietnam and, in fact, are so inter-related as to be considered parts of a single conflict.

At the time the Vietnam Agreement was concluded, the United States made clear to the North Vietnamese that the armed forces of the Khmer Government would suspend all offensive operations and that the United States aircraft supporting them would do likewise. We stated that, if the other side reciprocated, a de facto cease-fire would thereby be brought into force in Cambodia. However, we also stated that, if the communist forces carried out attacks, government forces and United States air forces would have to take necessary counter measures and that, in that event, we would continue to carry out air strikes in Cambodia as necessary until such time as a cease-fire could be brought into effect. These statements were based on our conviction that it was essential for Hanoi to understand that continuation of the hostilities in Cambodia and Laos would not be in its interest and that compliance with Article 20 of the Agreement would have to be reciprocal.

It has recently been suggested that the withdrawal of all U.S. armed forces from South Vietnam and the return of all U.S. prisoners has created a fundamentally new situation in which new authority must be sought by the President from the Congress to carry out air strikes in Cambodia.

The issue more accurately stated is whether the constitutional authority of the President to continue doing in Cambodia what the United States has lawfully been doing there expires with the withdrawal of U.S. armed forces from Vietnam and the return of American prisoners despite the fact that a cease-fire has not been achieved in Cambodia and North Vietnamese troops remain in Cambodia contrary to clear provisions of the Agreement. In other words, the issue is not whether the President may do something new, but rather whether what he has been doing must automatically stop, without regard to the consequences even though the Agreement is not being implemented by the other side.

The purposes of the United States in Southeast Asia have always included seeking a settlement to the Vietnamese war that would permit the people of South Vietnam to exercise their right to self-determination. The President has made this clear on many occasions. For example, on May 8, 1972, when he made the proposals that formed the basis for the ultimately successful negotiations with North Vietnam, he said there were three purposes to our military actions against Vietnam: first, to prevent the forceful imposition of a communist government in South Vietnam; second, to protect our remaining forces in South Vietnam; and third, to obtain the release of our prisoners. The joint communique issued by the President and Mr. Brezhnev in Moscow on May 29, 1972 in which the view of the United States was expressed said that negotiations on the basis of the President's May 8 proposals would be the quickest and most effective way to obtain the objectives of bringing the military conflict to an end as soon as possible and ensuring that the political future of South Vietnam should be left for the South Vietnamese people to decide for themselves, free from outside interference.

The recent opinion of the United States Court of Appeals for the District of Columbia Circuit in Mitchell v. Laird makes it clear that the President has the constitutional power to pursue all of these purposes. In the words of Judge Wyman, the President properly acted "with a profound concern for the durable interests of the nation—its defense, its honor, its morality."

The Agreement signed on January 27, 1973 represented a settlement consistent with these objectives. An important element in that Agreement is Article 20 which recognizes the underlying connections among the hostilities in all the countries of Indochina and required the cessation of foreign armed intervention in Laos and Cambodia. The importance of this article cannot be overstated, because the continuation of hostilities in Laos and Cambodia and the presence there of North Vietnamese troops threatens the right of self-determination of the South Vietnamese people, which is guaranteed by the Agreement.

The United States is gratified that a cease-fire agreement has been reached in Laos. It must be respected by all the parties and result in the prompt withdrawal of foreign forces. In Cambodia it has not yet been possible to bring about a cease-fire, and North Vietnamese forces have not withdrawn from that country. Under present circumstances, United States air support and material assistance are needed to support the armed forces of the Khmer Republic and thereby to render more likely the early conclusion of a cease-fire and implementation of Article 20
of the Agreement. Thus, U.S. air strikes in Cambodia do not represent a commitment by the United States to the defense of Cambodia as such but instead represent a meaningful interim action to bring about compliance with this critical provision in the Vietnam Agreement.

To stop these air strikes automatically at a fixed date would be as self-defeating as it would have been for the United States to withdraw its armed forces prematurely from South Vietnam while it was still trying to negotiate an agreement with North Vietnam. Had that been done in Vietnam, the Agreement of January 27 would never have been achieved; if it were done in Cambodia, there is no reason to believe that a cease-fire could be brought about in Cambodia or that the withdrawal of North Vietnamese forces from Cambodia could be obtained. It can be seen from this analysis that unilateral cessation of our United States air combat activity in Cambodia without the removal of North Vietnamese forces from that country would undermine the central achievement of the January Agreement as surely as would have a failure by the United States to insist on the inclusion in the Agreement of Article 20 requiring North Vietnamese withdrawal from Laos and Cambodia. The President's powers under Article II of the Constitution are adequate to prevent such a self-defeating result. It is worth noting that in reaching a similar conclusion, the report entitled "Congress and the Termination of the Vietnam War" recently prepared by your Committee by the Foreign Affairs Division of the Congressional Research Service, arrived at the same general conclusion as to the President's Constitutional power.

One must recognize that the scope and application of the President's powers under Article II of the Constitution are rarely free from dispute. Under the Constitution, the war powers are shared between the Executive and Legislative branches of the Government. The Congress is granted the powers "to provide for the common defense", "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water", "to raise and support armies", "to provide and maintain a navy", "to make rules for the government and regulation of the land and naval forces", and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." On the other hand, the Constitution provides that "the executive power shall be vested in a President," that he "shall be Commander-in-Chief of the army and navy of the United States," and that "he shall take care that the laws faithfully executed." The President is also given the authority to make treaties with the advice and consent of two thirds of the Senate, to appoint ambassadors with the advice and consent of the Senate, and to receive ambassadors and other public ministers.

The proceedings of the Federal Constitutional Convention in 1787 suggest that the ambiguities of this division of power between the President and the Congress were deliberately left unresolved with the understanding that they were to be defined by practice. There may be those who wish the framers of the Constitution would have been more precise, but it is submitted that there was great wisdom in realizing the impossibility of foreseeing all contingencies and in leaving considerable flexibility for the future play of political forces. The Constitution is a framework for democratic decision and action, not a source of ready-made answers to all questions, and that is one of its great strengths.

There is no question but that Congress should play an important role in decisions involving the use of armed forces abroad. With respect to the continuation of U.S. air combat activity in Cambodia, what is that role? The Congress has cooperated with the President in establishing the policy of firmness coupled with an openness to negotiation which has succeeded in bringing about the Agreement of January 27 and which can succeed in securing its implementation. This cooperation has been shown through consultations and through the authorization and appropriation process. The Congress has consistently rejected proposals by some members to withdraw this congressional participation and authority by cutting off appropriations for necessary military expenditures and foreign assistance. The Congress has also enacted several provisions with specific reference to Cambodia. The President's policy in Cambodia has been and continues to be fully consistent with these provisions.

5 U.S. Constitution, art. I, sec. 8.
6 U.S. Constitution, art. II, secs. 1 and 2.
7 For example, see sec. 7 of the Special Foreign Assistance Act of 1971 (Public Law 91-652, Jan. 5, 1971, 84 Stat. 1942) and secs. 655 and 656 of the Foreign Assistance Act of 1961, as amended (added by sec. 304(b) of Public Law 92-226, Feb. 7, 1972, 86 Stat. 29).
It was, of course, hoped that the Agreement signed at Paris on January 27 would be strictly implemented according to its terms, including the prompt conclusion of cease-fires in Laos and Cambodia and the withdrawal of foreign troops from those two countries. What has happened instead is that, in Laos, the cease-fire has been followed by continuing communist stalling in forming the new government and, in Cambodia, the communists responded to the efforts of the Khmer Government to bring about a de facto cease-fire with a fierce, general offensive. North Vietnamese forces remain in Laos and Cambodia and continue to infiltrate men and war material through these countries to the Republic of Vietnam. North Vietnamese forces in Cambodia continue to participate in and to support Communist offensive operations.

United States air strikes in Laos were an important element in the decision by North Vietnam and its Laotian allies to negotiate a cease-fire in Laos. If United States air strikes were stopped in Cambodia despite the communist offensive, there would be little, if any, incentive for the communists to seek a cease-fire in that country, and the temptation would doubtless be great for North Vietnam to leave its troops and supply lines indefinitely in Laos and Cambodia.

Such a situation would be the opposite of that prescribed by Article 20 of the Vietnam Agreement and would so threaten the viability of the settlement in Vietnam and the right to self-determination of the South Vietnamese people as to be totally unacceptable to the Republic of Vietnam and to the United States. In light of these facts, it seems clear that the argument that the Constitution requires immediate cessation of U.S. air strikes in Cambodia because of the Paris Agreement is, in reality, an argument that the Constitution which has permitted the United States to negotiate a peace agreement—a peace that guarantees the right of self-determination to the South Vietnamese people as well as the return of United States prisoners and withdrawal of United States armed forces from Vietnam—is a Constitution that contains an automatic self-destruct mechanism designed to destroy what has been so painfully achieved. We are now in the process of having further discussions with the North Vietnamese with regard to the implementation of the Paris Agreement. We hope these discussions will be successful and will lead to a cease-fire in Cambodia.

Mr. Brower. If you would like, Mr. Chairman, I would summarize that briefly and address myself to the question that has been asked.

Certainly it is true, as all lawyers know, that no constitutional question is an easy question. By definition they are difficult questions. That is why we have courts. That is why we have lawyers. That is what our system is all about. Naturally there can be differences of opinion as to what the precise legal answer is in a given case. I am, of course, well aware of the fact that some Members of this House and Members of the Senate who are able lawyers, have expressed themselves to the effect that the President of the United States lack legal authority to order air strikes in Cambodia.

I believe, however, that the predominant weight of legal opinion points the other way, and I would like to summarize briefly the administration position.

When President Nixon took office on January 20, 1969, there were somewhere in the neighborhood of half a million American troops in South Vietnam, and there were other operations ongoing in Indochina. I think it is not questioned at the present time that the President had the authority from that point forward to bring to a conclusion the hostilities, the involvement, the situation in Indochina.

In his speech of May 8 of last year the President stressed, as he had before, that there were three principal goals of this Government at that time in Indochina. The first of these was to bring an end to the conflict, to bring about and preserve peace in that area. The second was to achieve the safe withdrawal of our forces from that part of the world. The third stated objective was to achieve the return of our
prisoners of war who were then in captivity primarily in North Vietnam.

In pursuance of those goals, which I believe have generally had both the explicit and implicit support of Congress, the President authorized the conclusion on January 27 of this year, of the agreement with which we are all familiar regarding peace in Vietnam. That agreement provided for the achievement of the three objectives to which I have referred.

Now to date the latter two of those three goals have been fully achieved. American forces have been withdrawn from South Vietnam safely and all of our prisoners of war, so far as we are aware, have been returned to us.

The first of those three stated objectives, however, is not entirely realized. The agreement provides for the implementation of all three—two have been realized, one has still not yet been fully realized and that is where Cambodia comes into the picture.

In providing for realization of the first objective, the agreement of January 27, specifically in article 20, provides that all foreign troops shall be withdrawn from Laos and from Cambodia and that those territories will no longer be used by any of the parties to the agreement, particularly in any way which would threaten the right of South Vietnam to self-determination.

In the case of Laos a cease-fire has been arrived at, political discussions are going on, and pursuant to the Laos cease-fire agreement, 60 days after political agreement is reached there the withdrawal of North Vietnamese troops from Laos is to be achieved.

In Cambodia the Government declared in the wake of the January 27 agreement a unilateral cease-fire. Approximately a week went by and the answer by the North Vietnamese and other Communist forces in Cambodia was an all-out offensive. At the present time there is no cease-fire in Cambodia.

The absence of a cease-fire in Cambodia followed by withdrawal of North Vietnamese troops as required by article 20 of the agreement would be a substantial threat to the right of self-determination of South Vietnam, which is one of the principal objectives of the agreement of January 27 to guarantee.

If the President as of January 26 or January 27 had the authority, which I understand at this point is generally agreed, to pursue the three objectives to which I have referred, and in pursuance of those objectives to conclude an agreement which would formally provide for the realization of those objectives then it stands to reason that when two of the goals are implemented he does not suddenly lose authority which he previously possessed to secure the implementation of the agreement insofar as it affects the realization of the remaining third objective.

I believe that the question has really been asked in the wrong terms. The question is not: What new authority does the President have to do something new? The question really is: Why or how does the President suddenly lack authority which he has up to January 27 possessed?

Now I emphasize that the agreement of January 27, specifically article 20, is not offered as an independent basis for the President's
authority. The President's authority necessarily is and always must be rooted in the Constitution of the United States, in the constitutional legislation, and in other law which governs this Government and this people. The point is that in exercise of that authority the President has concluded this agreement, and having had the authority to pursue the goals embodied in that agreement, he certainly is not deprived of that authority, by its conclusion.

I believe that the arguments that arise are basically ones of policy, and when you really examine them, not of law. Those who argue that the President lacks authority to pursue in the ways he has the broader goals of peace in Indochina, I think, fundamentally do not agree, and historically have not agreed, that his policies were appropriate for the Government to follow.

Now this is the position of the administration. I started out by saying that I thought the weight of considered authority supports this. I am sure we can argue that back and forth quite a bit. Just let me make two notes on this and then conclude.

The chairman of the Committee on Foreign Relations in the other body requested the Congressional Research Service of the Library of Congress, specifically its Foreign Affairs Division, to do a study which has been published, and is entitled, "Congress and the Termination of the Vietnam War." While that study was directed to a somewhat different question than we are now addressing, it included conclusions which I think are pertinent to note. That study concluded, and I quote from page 10 of it, that "There is no bar to resumption by the President of hostilities in either country." That reference is to Laos and to Vietnam.

"There is no bar to resumption by the President of hostilities in either country or against the Democratic Republic of Vietnam (North Vietnam)."

I think that if it is concluded in this congressional study that the President has authority to do that, it necessarily includes the authority to continue conducting air strikes in Cambodia.

Finally, while I am quite aware of the fact that judicial precedents have relatively little solace to either side in this discussion, there is some comfort to be derived from some of the statements made.

Judge Wyzanski, who was probably one of the best known Federal judges in the United States recently presided over the District Court for the District of Columbia in the case in which some Members of this House were plaintiffs entitled Mitchell against Laird. In the course of reaching a decision, which did not dispose of the case on the merits I am frank to say, he did point out something which I think is pertinent to consideration of the propriety of the President's actions in pursuing the three goals I outlined: durable peace in Indochina, withdrawal of our forces, and recovery of our prisoners of war. Judge Wyzanski stated, and I will give you the full sentence so there will be no question about the context:

Even if his predecessors had exceeded their constitutional authority [which was not to say that they did] President Nixon's duty did not go beyond trying in good faith and to the best of his ability to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the Nation, its defense, its honor, its mortality.
I would be pleased now or at such time as you desire, Mr. Chairman, to answer questions I am sure you all have.

Mr. Nix. Mr. Brower, the question put to you was by what constitutional authority is the bombing being ordered in Cambodia? As I understood your answer, first you said no additional authority was needed, the assumption being the authority already existed, but you did not give us the source of that authority. You followed that by saying that article 20 was not necessary and it gave no independent authority for the President’s action.

Now the first question I would like you to address yourself to is that part of your answer which stated that the President had authority before the January 27 agreement.

Mr. Brower. Briefly stated, the President’s authority is derived from article 2 of the U.S. Constitution as Commander in Chief of the Armed Forces and Chief Executive in the conduct of our foreign relations, both to guide and order the conduct of our forces which were then—

Mr. Nix. May I interrupt you. You are not quoting article 2 when you say "both to guide" and et cetera.

Mr. Brower. I am not quoting article 2.

Mr. Nix. You are not quoting any decision that interprets article 2 consistent with what you added, are you?

Mr. Brower. I am not quoting a court decision. I was referring to the Constitution in the first part of the sentence and in the latter part of the sentence attempting to describe what I understand those powers to encompass and the circumstances.

Mr. Nix. So then your first reliance is that part of article 2 in which the President is the Commander in Chief of the Armed Forces, correct?

Mr. Brower. I said Commander in Chief of the Armed Forces, and Chief Executive in the conduct of our foreign relations.

Mr. Nix. All right, Chief Executive. Add that to it.

Now I want to know how in your opinion that gives him the authority to order the bombing in Cambodia.

Mr. Brower. My previous statement was designed to address itself to answering that question, Mr. Chairman. I am not sure how I can elaborate on that or summarize it further to your satisfaction. The President was pursuing three goals I believe correctly, constitutionally within the authority which he possessed, and possesses as Commander in Chief and Chief Executive. Some of the goals were more military, and some of the goals were more foreign relations oriented, but they were all within those collective powers.

Mr. Nix. Well, Mr. Brower, assume for the moment that the President pursued the goals that you are speaking of, but after the execution of the agreement of January 27 the situation was entirely changed and as I understand the meaning of the agreements both parties if they are acting in good faith are bound by the agreements. Would you agree with me on that?

Mr. Brower. I believe the parties are bound by the agreements.

Mr. Nix. Then you agree with me?

Mr. Brower. I am not sure I agree with every word of the statement.
Mr. Nix. If you agree with what I said, you must agree.

Mr. Brower. Well—

Mr. Nix. Nevertheless, we have the agreement of January 27, 1973, whatever it is, and we are agreed and disagreed that the President is or is not bound by a subject matter in that agreement.

Now, if he is bound by the subject matter in that agreement, Mr. Brower, let me ask you this. Don't you think that, assuming he had authority otherwise, he relinquished that, did he not, and embarked upon another course outlined in the agreement of January 27?

Mr. Brower. I respectfully disagree with that statement, Mr. Chairman. Just as the President does not derive authority from such an agreement independent of an authority he possesses by virtue of the Constitution, so he does not surrender or delegate his constitutional authority by signing that agreement.

Mr. Nix. So there will be no misunderstanding, let us say he suspended the exercise of it in this enterprise.

Mr. Brower. I would again say I think there is a different description which perhaps more fits the circumstances, Mr. Chairman. The President chose to exercise his constitutional authority to pursue those three goals in a certain way; the way he decided to exercise it was formalized in the agreement of January 27. He decided that the best way to achieve realization of his three goals was through the measures which are recorded in the agreement.

Now this agreement, like any other agreement, requires for its implementation and realization what you, Mr. Chairman, have referred to the good faith. Now let us look at article 20 in those terms. Where was the good faith on the side of the North Vietnamese party to the agreement when 1 week after the unilateral declaration of a cease-fire by the Government of Cambodia an all-out offensive supported by North Vietnamese forces was launched in Cambodia? Where was the good faith in carrying out an obligation agreed to by North Vietnam to encourage a cease-fire in Cambodia, to be followed by the withdrawal required by article 20 of the North Vietnamese forces?

Now with respect to article 20, for so long as the other parties to the agreement are not acting in accordance with article 20 it is proper for the United States under the agreement and to the President within his constitutional authority to act as he is acting.

Mr. Nix. Now, Mr. Brower, then the President elected to pursue the matter in accordance with the agreement of January 27. Now one party having entered into an agreement in good faith as I understand it, is not permitted to select the parts of that agreement which they wish to abide by, but the entire agreement.

Mr. Brower. Correct.

Mr. Nix. Now article 17 in the agreement sets up an agency to determine violations. Of course, South Vietnam is a party to the United States. That is true, of course, isn't it?

Mr. Brower. I think that article 17 refers to the two-party Joint Military Commission in which the two Vietnamese parties work with respect to problems in South Vietnam.

Mr. Nix. That is what I am speaking of.

Now, of course, Cambodia is not a party to that.

Mr. Brower. Correct.
Mr. Nix. But what I can't understand, Mr. Brower, is by what authority again other than what you have mentioned we have relinquished—by what authority was the bombing ordered in Cambodia? I still don't understand it. There is nothing in article 20 in my view that gives any authority to bomb Cambodia, and your discussions of it had not changed anything, so far as I am concerned.

Mr. Brower. The authority of course is fundamentally founded in the Constitution, as I have said. The authority of the President as so carried out does not conflict with—

Mr. Nix. But you have not said where in the Constitution.

Mr. Brower. I believe—

Mr. Nix. Article 2 you mentioned.

Mr. Brower. It is the powers of the President under article 2 as Commander in Chief and Chief Executive in the exercise of our foreign relations.

Mr. Nix. Do you have any authority, any decisions of the courts, the Supreme Court of this country, in interpreting your reference to mean what you attribute to it?

Mr. Brower. Well, as I indicated previously, I think decisions and particularly decisions of the U.S. Supreme Court to a certain extent offer little solace to either side in this discussion because these are questions which, when they arise in specific terms, are ordinarily treated as political questions.

Now, when you speak, Mr. Chairman, of authority, I anticipate that you are also asking whether or not there is specific congressional authorization, and perhaps I should address myself to this briefly.

The war powers as they are described of the U.S. Government are shared powers under the Constitution, they are shared by the executive branch and the Congress in ways which are not always very clearly delineated. They have been traced to some extent by historical experience.

Now the President in any important decision that he makes in the area of military activities and foreign affairs is and must be aware of the fact that Congress, too, has a role to play. Now the fact is that there is in force and has been for 2 years or more fairly restrictive legislation governing the activities that the U.S. Armed Forces may undertake with respect to Cambodia. Those restrictions have been closely adhered to, they have been fully honored, and the administration has been acting entirely within the limits of what has been proscribed by the Congress.

Now, when you say "authority," I recall that one reason there are lawyers and law schools, and courts is because on many questions, and particularly on important constitutional questions, it is not possible for anyone to flip open a book and say: "Here is the answer. Here is the case on all fours. There is no further question." Of course there is room for scholarly, intellectual, and political difference on these issues, but I think that the opinion expressed by the administration, and carefully reported, and the statement submitted by Secretary Rogers' testimony last week across the way, spells out a case showing that the President does possess the authority to conduct these activities in Cambodia, and I think that is at least tangentially confirmed by the
scholarly study that Congress itself has done and by statements that have been made in a judicial environment.

Mr. Nix. I would assume, Mr. Brower, that the State Department studied this matter, because it took a period of time from the end of January 1973, until April 30, 1973, for them to issue a statement covering this point, so they must have gone to graduate school on it.

Mr. Brower. I would say we did a careful job, Mr. Chairman.

Mr. Nix. I am sure you did.

Mr. Broomfield.

Mr. Broomfield. Thank you, Mr. Chairman.

Mr. Brower, apparently the State Department is basing its judgment first on the Constitution and the right of the President to conduct the bombing, but the main thing, as I understand it, is the violation that has occurred under article 20 of the Paris agreement where the North Vietnamese have brought in large numbers of troops. Is that correct?

Mr. Brower. If there were an effective cease-fire in Cambodia at the present time, the air strikes would not be going on.

Mr. Broomfield, I would like to ask Mr. Hummel, getting away from the constitutional authority, because I think that this is going to be a long, drawn out discussion, I wonder if you could give us some information on the situation as you see it with the different groups participating in Cambodia, and if the Lon Nol Government is defeated what the effect will be on the entire Indochina area.

Mr. Hummel. As the chairman’s opening statement indicated, the Khmer insurgent groups are divided into at least three, and possibly more, factions. There is little unity among them. Some of the Khmer insurgent groups claim loyalty to Prince Sihanouk. A sizable group of Khmer insurgents was originally a group that were insurgents against Sihanouk’s Government, and do not like him at all, and presumably would not wish to have him back.

A third much more loose category are people who may have started life as bandits and/or people in the political arena without clear affiliation.

The power behind all this has from the beginning been North Vietnamese. In 1970 Sihanouk was deposed by a well-supported and thoroughly popular action, and the Government was changed to a republican form under Lon Nol. At that point there were five North Vietnamese divisions ringing Phnom Penh. It was a North Vietnamese effort. Since that time the North Vietnamese have used a facade of attempting to make it appear that this is a civil war and have progressively introduced Khmer units trained in various places, but the North Vietnamese are still engaged to the extent of 8,000 North Vietnamese combat troops in combat with the government forces. The artillery and rocket units have been mentioned, all of the logistics come through a North Vietnamese pipeline, and there are cadres of North Vietnamese with virtually all of the Khmer insurgent units.

So, under these circumstances the Lon Nol Government has had a very difficult time. Its communications and its economic life have been badly disrupted. The situation is not nearly as bad, however, as I think one would assume from reading the somewhat sensational press reports. For instance, it is very seldom mentioned—I have not seen it
mentioned for a long time in the press—that the main road that connects the major seaport of Kompong Som with Phnom Penh is open and has been open for a number of weeks, and convoys are going back and forth on that road.

Now as to the consequences for the Government of Cambodia, and the consequences for the area of an American failure to support the government of the Khmer Republic, I would like to make a number of points. For instance, in the first place an American failure to support the legitimate government of Cambodia would seriously endanger the North Vietnamese cease-fire; it would directly affect the viability of the rather fragile arrangements that are now being worked out in connection with the Vietnam cease-fire agreement. This would be a serious blow to peace in the world, not merely our area.

American failure to continue to support would undoubtedly encourage the North Vietnamese to further violate article 20, and would encourage the North Vietnamese to continue and probably step up their activities to topple the government of the Khmer Republic, and the Communist side might very well succeed in this.

I would also point out that American failure to support would materially endanger the success of the negotiations that will take place later this month between American officials and North Vietnamese officials—the negotiations that Ambassador William Sullivan went to Paris to arrange for last week. This is an extremely crucial time in the observance of the cease-fire arrangement, and in the construction of viable arrangements that can result finally in peace for this very troubled area.

I would suggest that precipitate American action by the legislative branch that might preclude the possibility of American continued support for Lon Nol would not in any way assist those negotiations and, in fact, would seriously endanger them.

Finally, I would like to point out that American failure to support the legitimate government in Cambodia could have seriously destabilizing effects on other countries in the area, in the immediate area, the neighboring countries of Indochina and other countries in Southeast Asia. Also, I think, it could have some worldwide impacts if it is felt that the United States does not have the will to follow through to take the steps that seem to be necessary in order to achieve a final peace in Indochina. There could be an undermining of confidence in American purpose, and an undermining of confidence that countries now have in us—in our vision, in our purpose, in our objectives—and this could I think have long-term repercussions in that their confidence would no longer be so strong.

I don't know if I have answered the thrust of your question, sir.

Mr. Broomefield. Pretty well. How about the POW question, the missing in action, would that also have an adverse effect on probability of receiving an accounting of those missing in action too?

Mr. Himmel. And any deterioration in the implementation of the Vietnam cease-fire agreement would, of course, as you suggest, have serious repercussions in that the other side would no longer have the inducement, would no longer perhaps feel the obligation, to follow through what is written in the agreement about tracing people who are missing in action, about the search for air crash sites, for graves,
and about the interviewing of local populations that many Americans want to see take place in the tracing of the missing in action.

Mr. Broomfield. Is it not true that Dr. Kissinger is presently working with Russian officials to try to bring out a negotiated settlement in Cambodia?

Mr. Hummel. I don’t think I wish to state precisely what Dr. Kissinger has discussed—I believe he has returned now to Washington—has been discussing in the Soviet Union, but I am certain that the topics we are addressing here were also brought up in his conversations.

Mr. Riegel. Would the gentleman from Michigan yield for a point of information?

Mr. Broomfield. Yes.

Mr. Riegel. Several time you used the phrase “legitimate government of Cambodia.” What is the legal basis for ascribing legitimacy to that particular government?

Mr. Hummel. First of all, there is not any other government in existence in the country. Sihanouk claims to have a government, but it is a government in exile, and I don’t see how anyone would consider it legitimate.

Mr. Riegel. No elections or anything of that kind?

Mr. Hummel. Elections have been held in Cambodia after the deposition of Sihanouk, and under the republican framework of the government of the Khmer Republic, and this we consider and the majority of nations consider to be the legitimate successor government of the previous one.

I think, if I am not mistaken, the ratio of countries that recognize the government in Phnom Penh as opposed to those that recognize Sihanouk in exile in China is about 80-odd for the former government in Phnom Penh as opposed to 30-odd who say they recognize Sihanouk.

Mr. Riegel. I thank the gentleman.

Mr. Hummel. Mr. Hummel, if I understood you earlier in your remarks you said under no circumstances would we introduce ground combat troops into Cambodia. Did I hear correctly?

Mr. Hummel. Pardon?

Mr. Wolff. If I heard your testimony earlier correctly you said that we would not introduce ground combat troops into Cambodia.

Mr. Hummel. That is correct.

Mr. Wolff. Now just a moment ago you went through a listing of what would happen if America failed to support the legitimate government of Cambodia, and among other things you said it would jeopardize world peace, that it would have a destabilizing effect on other nations, that it would have a worldwide impact, that it would undermine confidence in America. If all of those things happen, and if the American national interest is so greatly involved in Cambodia as you have just spelled out, why would we not use ground troops?

Mr. Hummel. For one thing there is an explicit congressional prohibition against the use of ground forces there.

Mr. Wolff. Are you opposed to that?

Mr. Hummel. No, sir. I am not. We have no intention of asking for a lifting of that prohibition, and we are living within all of the congres-
sional restrictions that have been placed on American activities in Cambodia, and we are not requesting that any of these restrictions be removed.

Mr. Wolff. How can you support that congressional prohibition and yet at the same time say American failure to support the legitimate government of Cambodia would have all of these dire consequences, including jeopardizing world peace?

Mr. Hummel. Because what we are doing, sir, is appealing to this body not to place the restrictions upon American activity that might have these deleterious results. We are not addressing at this moment beyond what I have said, the contingency that I hope will not arise that this body and the other body might take action that effectively prohibits our support of Cambodia.

Mr. Wolff. May I suggest, Mr. Hummel, that your rhetoric in defense of the bombing of Cambodia sounds to me as if we were concerned about an invasion of Florida or something of that drastic nature.

Now Secretary Rogers didn’t go that far at all, he simply said in his statement that the U.S. air strikes in Cambodia do not first of all represent a commitment of any kind of the United States to defend Cambodia but merely a meaningful interim action to bring about compliance with the Vietnam agreement.

I am concerned that with the rhetoric you have put forth to this committee that you are going to be trapped by your own rhetoric. Now suppose it happens that the bombing does not bring about a compliance with the agreement, and there is no indication that it has so far. What happens then?

Mr. Hummel. Secretary Rogers said the other day, and I have his full statement yesterday before the Senate Appropriations Committee—he said, and I quote in part, and this is addressing the subject of the destabilizing effect:

New relationships are developing in Asia which could provide the basis for long-term stability. These relationships are still fragile and the transition to stability is a delicate process. A sudden reduction in the American commitment to this process could sacrifice the progress already achieved. Lack of implementation of the Paris Agreement would certainly be interpreted as just such an act.

This is the context solely of Cambodia, his full statement was addressing Cambodia.

I would not wish it to appear that I am saying, as you seem to imply, Mr. Wolff, that the dire consequences for world peace and stability might include the eruption of a third world war as a result of American failure to act. I did not intend to make any such drastic predictions, but I think I have a legitimate point.

Mr. Wolff. Mr. Hummel went down a long list of consequences that would flow if America failed to support the Government of Cambodia, and you tied it into all of the things that I recited, and I think more as well. It just seems to me that this ties the national interest of the United States to the Lon Nol government in effect, which I personally find quite incorrect. Do you tie the national interests of the United States to the Lon Nol government?

Mr. Hummel. No, sir. We have said repeatedly, and a number of Government officials have said that we are not wedded to any particular Cambodian government. We want to see a cease-fire, and we want
in the long run to see a neutral Cambodia. We have not tied our American policy to any particular Cambodian government.

Mr. Wolff. Do you tie the American national interests to the legitimate Government of Cambodia, which is your phrase?

Mr. Hummel. I would hope that the United States Government would have relations with any legitimate government of Cambodia.

Mr. Wolff. Why has not the United States attempted to apply the recourse of article 7 of the Declaration of the International Conference on Vietnam?

Mr. Hummel. If I might ask Mr. Brower to address that.

Mr. Brower. Congressman, you referred to article 7 of the final Act of Paris by which 12 parties in effect returned the agreement January 27. That remedy is not an exclusive remedy, it is not stated by the Act of Paris—

Mr. Wolff. Have we made any attempt to apply it?

Mr. Brower. In this sense we have. The North Vietnamese have circulated within the last 3 weeks a very lengthy note alleging various violations of the agreement. In response to that we have also circulated to the Act of Paris a rather lengthy statement of our view of the situation with respect to violation of the agreement, so in a sense a consultation process has been underway.

Apart from that I think it is fair to say without going into detail that this question has been a matter of discussion between us and other parties to the Act of Paris. It is not an either/or proposition, you proceed under this but not under that. You proceed under article 7 of the Act of Paris, but not under your rights under international law to enforce the agreement of January 27. They are not mutually exclusive.

Mr. Wolff. Well, I understand that but it would seem to me that if you enter into an agreement which does have a provision in it which seeks enforcement that you would at least turn to that provision as one alternative that you might seek other than just bombing.

Mr. Brower. As I say, we have undertaken actions which I think are within the general contemplation of article 27, although we have not taken the full formal steps obviously that are spelled out in article 7. I would in reference to the questioning that led into this make one point and that is, I think it important that in viewing this situation there not be so much concentration or undue concern about the assistance to the Cambodia aspect of this. Of course assistance to Cambodia is implicit, it is a part of trying to achieve a cease-fire in Cambodia. The principal objection at the present time is to bring about the cease-fire which the parties to the January 27 agreement pledged themselves to encourage, and which is as a practical matter—

Mr. Wolff. Is there any evidence presently that our bombing is helping to bring about compliance with the cease-fire?

Mr. Hummel. To this extent, yes, that in the absence of air support there would be no incentive whatever for the North Vietnamese and the Khmer insurgents to sit down with the Government and engage in cease-fire negotiations. If you recall, sir, the administration spokesman made a very similar—

Mr. Wolff. You are using a negative kind of argument, Mr. Hummel, that I don't personally find very persuasive.
As a result of our bombing have we had any positive developments that would indicate who it is that is helping to bring about a compliance with the cease-fire?

Mr. Hummel. Beyond what I have tried to say, sir, no, I cannot cite any particular evidence, except I would like to insist—

Mr. Wolff. Are we just going to bomb indefinitely? Is it the policy of the United States Government to keep bombing until we get a cease-fire? Is that our policy?

Mr. Hummel. We believe that the prospects for a cease-fire are not as distant as you seem to imply.

Mr. Wolff. Mr. Secretary, I am asking a question. Is it the policy of the United States Government to keep bombing in Cambodia until we get a cease-fire?

Mr. Hummel. The policy at this time, sir, is to continue to support that government with air support, with bombing—

Mr. Wolff. Until we get a cease-fire?

Mr. Hummel. We believe that one factor will ameliorate this situation automatically, and this is the coming of the rainy season when the pressures by the insurgents on the Government of Cambodia is likely to lessen, when we feel that the bombing, which you and other Members of Congress apparently object to very strenuously may no longer be required, in the same amounts at least.

Now I do not know how to answer your question about when a cease-fire can be achieved. We simply do not know.

Mr. Wolff. I realize you don’t know that, but the policy of the Government, as I understand you to articulate it, is that we are going to do one thing to get a compliance with that cease-fire, and that is bomb, and bomb, and bomb, and bomb, and bomb until we get compliance with the cease-fire. You are not following the other alternative approaches that were open originally to us and under the Paris Agreement; we are just going to bomb.

Mr. Hummel. May I say that the diplomatic negotiations that I referred to are an element of hope—they are going to take place sometime this month—and that the situation in Cambodia as one of the major keys to the compliance to the success of the cease-fire agreement is obviously going to be discussed in those negotiations.

We are undertaking other diplomatic representations. We are not inactive on the diplomatic front, and I can assure you that no one wishes to see the end of this situation more than the American Government. We are taking what steps can be taken outside of the framework of the pure military activities.

Mr. Wolff. Well, let me say in response to that, I am sure this member of the committee would be very interested in every step you are taking other than bombing to bring about compliance with the cease-fire. I have seen very little of it, and you certainly have not testified about it up to this point—

Mr. Brower. Mr. Chairman—

Mr. Wolff. Mr. Chairman, there are many other members I know that want to question.

Mr. Nixon. If there is no objection, the statement presented by Secretary Rogers will be made a part of the record at this point.
STATEMENT OF SECRETARY OF STATE WILLIAM P. ROGERS BEFORE THE SENATE APPROPRIATIONS COMMITTEE, MAY 8, 1973

Mr. Chairman and members of the committee, I appreciate this opportunity to appear before you in support of the Administration’s request to transfer already appropriated funds within the Defense budget. Yesterday Secretary Richardson discussed with you the specific need for transfer authority for these funds. This morning I would like to talk with you about the broader issue—how do we end this war?

One invitingly simple answer that is being offered to us is that the United States can bring about peace unilaterally by just stopping the bombing in Cambodia. But it is not that simple.

Just ten weeks ago we did unilaterally stop bombing in Cambodia. And we all know what happened. The North Vietnamese and the Cambodian insurgents took advantage of this opportunity for peace by launching a major military offensive. They responded to the Cambodian Government’s unilateral ceasefire and call for negotiations with a demand for “total victory” and a refusal to negotiate.

The choice they posed then, and the choice before us today, is whether to allow a military takeover of Cambodia by North Viet-Nam and its allies or insist upon observation of a negotiated peace.

When we analyze these two options, I believe the choice is clear. Just three months ago we signed an agreement in Paris with the North Vietnamese. Article 20 of that agreement stipulated:

“Foreign countries shall put an end to all military activities in Cambodia and Laos, totally withdraw from and refrain from reintroducing into these two countries troops, military advisers and military personnel, armaments, munitions and war material.”

The United States did cease its only military activity—the bombing. We had no troops in Cambodia. By contrast about half of the estimated 70,000 to 75,000 enemy forces in Cambodia are North Vietnamese. To the best of our knowledge, none have been withdrawn. In fact the sustained offensive which began when we stopped bombing was instigated, led and supported by North Vietnamese troops.

Is this a civil war when half of one side’s armed forces are foreign?

What should U.S. policy be under such circumstances? First, our actions will be strictly limited to our limited objective.

We will not slide into another Viet-Nam.

We will not introduce American ground forces.

We are not committed to any particular Cambodian Government.

Our only purpose is to ensure that the Paris peace agreement is observed. We have no other objective. The reason we are bombing in Cambodia is to bring about the implementation of this agreement. We are just as eager to stop the bombing as it is possible to be. And, of course, we will do so just as soon as there is a ceasefire. This is in accord with our mutual agreement with North Viet-Nam. This is our only condition.

It is clear to everyone that the fighting in Cambodia would stop if North Vietnamese forces were withdrawn. I understand that a recent Senate report came to just this conclusion. For the war in Cambodia has always been a product of the struggle in Viet-Nam. In fact the fighting first erupted in Cambodia when the Cambodians ordered the North Vietnamese and Viet Cong to leave their country. The aggressors in 1970 and the aggressors today are the North Vietnamese.

Peace must come to all of the nations of Indochina. Or it will not come permanently to any of them. The fall of Cambodia into North Vietnamese hands would endanger the framework of both the Viet-Nam ceasefire and the entire Indochina situation.

Cambodia is a small country involved in a conflict not of its own making, which only wants to be left alone. We are perfectly willing to allow the Cambodians to determine their own political future. Now the North Vietnamese must demonstrate the same approach by observing the peace agreement.

The appropriations bill which you are considering today is not an open-ended commitment to prolong this war. It simply requests funds until the end of this fiscal year. We all understand that it takes time to finally bring to an end a war which has lasted for over a quarter of a century. We are greatly com-
cerned over the repeated and serious violations by the communist side. But we should not lose hope that the Paris peace agreement will be carried out.

Fortunately there are positive signs as well as continuing problems. Fighting in Vietnam recently has been at a low level. In Laos fighting has markedly declined and the two sides are discussing implementation of their agreement. And in Cambodia the government has formed a new leadership council to achieve more broadly based public support. We believe that ceasefire negotiations in Cambodia are still possible. With our support the Cambodian Government is continuing attempts to initiate direct negotiations with its opponents.

We all want to see the bombing stop, but our broader objective is a lasting peace throughout Indochina. A halt in one kind of fighting, a ceasefire by only one side, is clearly not enough.

By remaining firm with the North Vietnamese we have come a long way toward peace. The Paris agreement provides a mutually acceptable framework upon which a lasting peace can be accomplished. For the United States, it has freed our prisoners of war and allowed us to withdraw all of our forces from Vietnam. For the people of Indochina it has brought the first hope of genuine peace for over a quarter century. Surely this is an agreement worth defending.

A period of adjustment is required to overcome the tensions and distrust which have accumulated during this long war. But our objective is to help Indochina and all of Asia turn away from confrontation and toward the common tasks of economic development and political cooperation.

New relationships are developing in Asia which could provide the basis for long-term stability. These relationships are still fragile and the transition to stability is a delicate process. A sudden reduction in the American commitment to this process could sacrifice the progress already achieved. Lack of concern over implementation of the Paris agreement would certainly be interpreted as just such an act.

We have been able to make concrete progress toward a more stable world in recent years not by wishful thinking about our adversaries nor by abandoning our friends and allies. We have done it by demonstrating strength, perseverance and a willingness to negotiate. It is this approach which can still bring the peace to Indochina we all want.

Mr. BURKE. I think Cambodia is not a part of the SEATO Treaty, it is a protocol state. What obligation have we then technically to even support any part of their government?

Mr. HUMMEL. We have no commitments to this government or obligation in the SEATO framework, or any other. Cambodia is inside the area described in the Manila Pact. The SEATO treaty has a protocol area, but two Cambodian governments have made it known that they do not wish to be considered a part of SEATO, and would not ask for assistance under SEATO, so SEATO is not involved in any of the activities we have taken.

Mr. BURKE. The bombing then actually being done is in connection with the war in North Vietnam so as to insure the fulfillment of the so-called peace terms, or should I say the responsibilities of both the North and South Vietnamese, is that correct?

Mr. HUMMEL. That is the major purpose, yes.

Mr. BURKE. I think then, it would be important again to ask by what authority does the agreement give to the President the right to continue the bombing especially in view of the words of the agreement itself?

Mr. BROWER. I have tried to make clear—perhaps as worthy of reiterating—that we are not saying that the agreement of January 27 itself is a source of authority for the President to bomb independent of his constitutional authority. The source of his authority is the law of the United States, principally the Constitution. The agreement was
concluded in exercise of his constitutional authority, and to some extent sets the outline of how his constitutional authority will be exercised.

Mr. Burke. Well, can you give me an instance when a violation of agreement in the past, any agreement the U.S. Government may have had with a foreign nation, caused such drastic action?

Mr. Brower. If you mean by such drastic action—Bombing a neutral country.

Mr. Brower. Actual warfare. I would have to supply that for the record. I do not recall off hand. I do know that the United States on two occasions that I can recall has come pretty close to a hostile situation in enforcing its rights with respect to the western sectors of Berlin, which rights are recorded in executive agreement including three other countries.

Mr. Burke. That may be right, but I think the question still arises as it did in the Dominican Republic and that is whether then Mr. Johnson had any authority to send troops into the Dominican Republic without the Congress authorizing such action.

I think the Members of Congress, and certainly of this committee—although I do not purport to speak for them—would like to know to just what extent the executive part of our Government feels it has the authority, under the Constitution, and by the way, understand it the same as you do—

Mr. Brower. You are not alone.

Mr. Burke. [continuing]. That is, to allow the President to go into areas and possibly get our country committed to another war. In fact, I don't understand one other thing about the present situation. I can't understand how the Defense Department can commit money that the Congress has not authorized for such action in advance of what the Congress does, such as has been done in these bombings.

I wonder if you could, with the permission of the chairman and the committee, submit some evidence of some instances when we have carried on such actions in the past and put it in the record.

Mr. Brower. I would like to understand the question. When we have bombed?

Mr. Burke. No: no.

When we have had an agreement but no treaty and on our own have taken drastic steps to become militarily involved to enforce the provisions of an agreement without further treaty negotiations.

Mr. Brower. Well, I would be glad to supply those for the record. There are a number of instances, a number of them related to the Second World War in particular.

Mr. Burke. What I am asking now is that you as a constitutional lawyer submit some legal authority authorizing such action.

Mr. Nix. Without objection, that may be submitted for the record.1

Mr. Bingham. Would the gentleman yield.

Didn't the gentleman mean to say under executive agreement rather than treaty?

Mr. Burke. Yes, executive agreement such as we have in this situation.

1The material requested by Mr. Burke will be supplied for the subcommittee files at a later date as the final State Department study had not been edited in its entirety at the time of printing.
Mr. Brower. That is true. I would have to say, however, that this is Vietnam. Indochina is somewhat different from the other situations. We probably have in our history no previous examples of such an extended involvement in hostilities abroad which had during its course so many different elements, and so many different bases, including in this particular case the Tonkin Gulf Resolution, and the SEATO treaty, and some other items. I am therefore not sure what value the precedents will be one way or the other, but we will do our best to give the fullest historical recount of what would be pertinent.

Mr. Burke. Thank you.

I have no further questions.

Mr. Nixon. Without objection, I think it would be profitable to us if we permitted Mr. Miller to express his views as to the statement made by Mr. Brower, if that is agreeable with the committee.

Mr. Harrington. Mr. Chairman, just as a question before doing it. I assume, even though I speak as a nonmember of your subcommittee, I don't have a chance to be reached in view of the committee---

Mr. Nixon. That is the reason, because of the time.

Mr. Harrington. Will we adjourn to a time at which we can expect this same group back to have further questions?

Mr. Nixon. We have that in mind.

Mr. Miller.

STATEMENT OF ARTHUR S. MILLER, PROFESSOR OF CONSTITUTIONAL LAW, GEORGE WASHINGTON UNIVERSITY, AND CONSULTANT TO SENATOR SAM ERVIN, SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS

Mr. Miller. Thank you, sir. I will be as brief as possible. I have a prepared statement which I have filed with the committee, and which I hope will be printed in full at the conclusion of my summary.

I sat here with considerable interest and a feeling of deja vu, I think, listening to these gentlemen this morning. We have heard this all before, for the last 12 years or more. It is the same sort of language we have long heard. I wonder whether they talk like that in the State Department over lunch, for example. I do not understand how people can talk this way. The legal basis for this action was stated by Ambassador Sullivan, who said, so I understand, that it was because President Nixon won the election. That is what Mr. Sullivan said.

Mr. Brower. He is not a lawyer.

Mr. Miller. He didn't have to be a lawyer.

Mr. Doolin. And he didn't say it.

Mr. Miller. He denies it, but he did say it.

Mr. Nixon. Mr. Miller, may I interrupt to say this. I can understand disagreements; we have that on the Watergate.

Mr. Miller. All right, sir.

The question I would put on the basis of it, which I think is very important for your subcommittee to listen to, is the problem of secrecy in Government. I don't think we have all the facts. Certainly the public does not have, and I gather from the tenor of the conversation this
morning this subcommittee does not have the facts. Unless you get
the full statement of the facts, I do not think you can make an evaluation
of what is actually going on out there.

Now as to the legal basis, I don't find the Constitution so unclear as
does Mr. Brower. There is a clear commitment in the Constitution to
a shared power between the Congress and the President so far as the
commitment of this Nation to hostilities. That was stated, for exa­
ample, over a hundred years ago by Mr. Justice Grier when he said this,
in the course of upholding by the way President Lincoln's action to
blockade the Southern ports. He said that the President "has no power
to initiate or declare a war against a foreign nation or a domestic
state." Then he went on to say that the President has power to resist
invasion by a foreign nation, and so on; he not only has the power but
has the duty to do it.

So there is a shared power here, sir, and the Constitution is clear
on that. The Constitution is also quite clear that Congress has a say
in the commitment. It is utterly clear, of the use of Armed Forces. The
Congress has indicated its will at least two or three times in recent
years, by repealing, for example, the Gulf of Tonkin resolution. There
is a clear indication of congressional will so far as the use of Armed
Forces in that part of the world.

No one denies the power of the President to remove the troops and
to get our prisoners back. What I don't find is any one authority say­
ing, as did Mr. Brower, that it is the weight of authority for the
President to bomb Cambodia. I don't know anyone saving it except
the State Department. If I may say so, that was a rather self-serving
document by the Secretary, who is also a lawyer. If I may use a
stronger term, I find the Secretary's document intellectually dis­
honest. It is a document which is at best a self-servin document; it is a
bootstraps argument.

There is no power in the President to use the Armed Forces in this
way. I don't know any reputable constitutional scholar in the country
who would so maintain. I could be corrected on that, but I certainly
don't know of any.

Another thing that Congress indicated a couple of years ago, of


course, was the Cooper-Church amendment, the limitation on use of
ground forces. Well, let me suggest one thing. The President has
said, and I heard his Deputy Attorney General so state, that the
President can ignore the will of Congress by impounding funds. He
can refuse to spend money anytime he wants to, said Mr. Sneed.

Judge Gasch, by the way, said that he could not on the water
pollution bill yesterday, but the President has said, "I can ignore a
law of Congress so far as an appropriation is concerned." Why does
not this same power then carry over? Why are we to believe the
President or any of the people in the executive department if he as­
serts the power not to spend money? I find no basis for believing him.
I would like to believe people. I find no basis for believing these
people.

Second, and I think I would end on a note like this, it is not a
matter of technical law. The article 20 of the January agreement
is a bootstraps argument at best. You cannot point to something you
have done yourself as a legal basis for saying you can continue doing
it. Any first-year law student knows better than that, and certainly the Secretary of State should know better than that.

The Commander-in-Chief powers, of course, give the President not only the power but the duty to protect this Nation. Are we to understand that there is some danger to this country? We have gone through the domino theory and all the other theories many, many times and for many, many years. If I understand Mr. Hummel correctly, he is resurrecting the domino theory.

Now, what is the national interest? What is this interest that makes it so important to world peace that we go over there and drop bombs on little brown men in black pajamas?

I would suggest one thing further without bringing a racist remark into it, and without attributing racism at all with this, that if we were bombing white Europeans you would find an uproar, here. We would not be doing it.

The President, of course, has the raw power; he can bomb because you let him get away with it. You can stop him if you want to and you have got the constitutional power to do it. He does not have the legal authority to do it, but he has got the raw power to do it, and he is going to continue doing it unless Congress pulls itself up by its own bootstraps and stops him.

Thank you, sir.

[Mr. Miller's prepared statement follows:]

STATEMENT OF PROF. ARTHUR S. MILLER, NATIONAL LAW CENTER, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.

THE CONSTITUTION AND MILITARY OPERATIONS IN CAMBODIA

Introduction

I appreciate this opportunity to testify before your Subcommittee on the delicate and important question of the President's constitutional authority to conduct military operations in Cambodia. In the main, it appears that only air power has been employed; I do not know of any present-day introduction of ground forces in Cambodia. It should be mentioned, however, that the press accounts have been scanty, at best, perhaps because of a systematic attempt to control or limit the flow of news on exactly what American forces are doing. In this connection, an initial question your Subcommittee may wish to analyze is the amount and nature of information available to Congress and the American people about Cambodia. In other words, pervasive practices of governmental secrecy, fully documented in hearings before Congress, evidence a desire by the Executive Branch either to conceal or to manipulate public opinion. If the so-called "Pentagon Papers" showed anything, they clearly revealed a pattern of deception carried out over a number of years by high-level officers in the Executive Branch, often aided and abetted by Members of Congress.

These brief remarks today will deal with (a) the general powers of the President, under the Constitution and the statutes, to carry out such military operations; and (b) an evaluation of the legal position of the President as set forth in the memorandum submitted May 1st by Secretary of State Rogers to the Senate Foreign Relations Committee. In the main, what follows consists of a series of propositions, buttressed at times with a little discussion, on those two principal questions.

Legal powers of the President

1. If, as most lawyers would assert, the Supreme Court has the final word as to the meaning to be given the delphic words of the Constitution, it should be noted at the outset that there is very little judge-made law on the military powers of the President. The judiciary has tended to shy away from deciding such disputes as do arise; this was clearly indicated in the case of Mitchell v. Laird, a portion of which was quoted by Mr. Rogers (of which more later), where
said that it was without power to rule on whether the Indo-China conflict was a "war" in the constitutional sense; said Judge Wyzzanski for the court: "... we are faced with what has traditionally been called a 'political question' which is beyond the judicial power conferred by Article II of the United States Constitution."

2. There is no Supreme Court case directly on point, assuming that the issue is the employment of armed forces by presidential order halfway around the world.

3. The President does have a "reserve" power to take such actions as may be necessary to defend this nation and to insure its survival when actual danger to the nation itself is manifest. See the Prize Cases, 2 Black 635 (1863), in which the Supreme Court upheld the right of President Lincoln to institute a blockade of Southern ports during the Civil War. In that case, Justice Grier, speaking for the Court, said that the President "has no power to initiate or declare a war against a foreign nation or a domestic state... If a war is made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force." The existence of that presidential authority and duty, however, goes only, as Justice Grier indicated, to situations when the security of the nation or of its armed forces is obviously threatened. I do not understand the Executive's contention that whatever is taking place in Cambodia today is an actual threat to the physical security of the United States or to any of our military forces.

4. The leading case on the powers of the President is the so-called Steel Seizure Case, 345 U.S. 579 (1953) in which the Supreme Court invalidated President Truman's seizure of the steel mills during the Korean conflict. In that case, Justice Black, speaking for the Court, said that the President's power must flow from either the Constitution or a statute. Even if it is conceded, as indeed it must, that Justice Black's formulation was far too simplistic to cover the myriad situations of presidential power, surely that decision stands as a landmark of our constitutional history. It states a general proposition that is indisputable—that the President, if not the letter, of the Constitution requires Congressional participation in the decisions setting basic policy. I would suggest that Cambodia is such a situation and that, accordingly, the Steel Seizure Case stands squarely in the way of any Presidential assertion of a unilateral authority to bomb or otherwise commit American forces there.

5. Justice Jackson's concurring opinion in the Steel Seizure Case sets out an often-cited hierarchy of Presidential powers: (a) Presidential power is at its height when he acts "pursuant to an express or implied authorization from Congress"; if, said Jackson, a President's act is held unconstitutional, it usually means that the federal government "as an undivided whole" lacks power; (b) when the President acts in the absence of express or implied constitutional power, "he can only rely upon his own independent powers"; and (c) "When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."

I suggest that the bombing of Cambodia fits the third category and that the President, in relying on his "commander-in-chief" powers must exercise those in the light of both the express constitutional mandate that only Congress can declare war and at least the implied statutory sentiment that armed forces are not to be used in Cambodia. In this connection, see the so-called Cooper-Church Amendment, Section 7 of Public Law 91-652 as amended by Public Law 92-226. There can be no doubt that the President is acting contrary to the constitutional requirement of Congressional acquiescence in military violence (outside, as I have said, of outright emergencies, such as an imminent invasion of our shores or danger to American troops) and to the statutory provision. That provision no doubt was hortatory rather than binding, and has been so treated by the President; but at least it means that the President's actions carry, as Justice Jackson said, a heavy burden: "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."

It will not do, it should be emphasized, to claim, as it has been claimed at times by the Executive, that appropriations by Congress in some way "ratified" what was an otherwise unconstitutional act by the Executive. There is case law, in lower federal courts, to the effect that Congress assented to the Indo-Chinese "war" by appropriations, draft extensions, and cognate laws. See, for example,
Oriando v. Laird, 443 F.2d 1939 (2nd Cir. 1971); Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970); United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968). But that claim was said to be "unsound" by the court's majority in Mitchell v. Laird, supra, with Judge Wyzanski stating: "This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft refers to that war... We should not construe votes cast in pity and piety as though they were votes freely given to express consent. Hence Chief Judge Bazelon and I agree that none of the legislation drawn to the court's attention may serve as a valid assent to the war." (Parenthetically, I find it odd indeed, as will be discussed more fully below, that a lawyer once an Attorney General and now Secretary of State can quote from the Mitchell case without indicating that the court simply did not uphold his position.)

So is the Executive helped, as at times it is asserted, by the Supreme Court's decision in United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936), a case often cited for the proposition that the President is the sole organ of American foreign affairs. It takes no extended argument to show that making war, at the very least, is a shared power; and also that the Curtiss-Wright case, as Justice Jackson said in the Steel Seizure case, did not involve "the question of the President's power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress." Secretary Rogers is to be commended for not relying on Curtiss-Wright, something that his minions in Foggy Bottom have tended to do in the past.

6. The commander-in-chief powers of the President relate, speaking generally, to the tactical control of troops in the field or in the garrisons. They cannot and should not be extended to the point that it is held that those powers include the power to commit troops to violence whenever the President desires. That was not the law in the past, is not the law now, and certainly should not be the law in the future—again excepting the surprise attack and other similar matters on American territory or American forces. (Compare Corwin, The President: Office and Powers (4th ed. 1957) with Bickel, The Constitution and the War," Commentary, July 1972, p. 40.)

7. In sum, the power to commit the American military in situations such as Cambodia, if they are to be considered to be valid under the Constitution, must have express Congressional approval.

The Rogers memorandum

1. In testimony before the Senate Foreign Relations Committee last week, the Secretary submitted a memorandum entitled "Presidential Authority to Continue United States Air Combat Operations in Cambodia." At best, this is a self-serving document, intellectually meretricious. It justifies bombing Cambodia because of Article 20 of the Vietnam "peace" agreement of January 27, 1973 and under the commander-in-chief powers of the President. That simply is not enough, as has been shown and as will be amplified below.

2. It of course is a pure "bootstraps" argument to point to a Presidential agreement (that of January 1973) and use it as a basis for further action. Under no circumstance here, can the Executive point to something he has done in the past as authority for continuing to do it (or something similar) in the future. Any first-year law student knows better than that.

3. Mr. Rogers, as is the custom of lawyers in and out of government, quotes Mitchell v. Laird out of context. He implies that Judge Wyzanski would hold that the President acted properly. Emphatically, however, Judge Wyzanski and the Court of Appeals did no such thing, as a full quotation from the decision indicates (the italicized portion is that quoted by Rogers): "Yet it does not follow that plaintiffs are entitled to prevail. When on January 20, 1969 President Nixon took office, and when on the same or even later dates the other individual defendants took their present offices, they were faced with a belligerent situation not of their creation. Obviously, the President could not properly execute the duties of his office or his responsibility as Commander-in-Chief by ordering hostilities to cease on the very day he took office. Even if his predecessors had exceeded their constitutional authority, President Nixon's duty did not go beyond trying, in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the nation—its defense, its honor, its morality.
“Whether President Nixon did so proceed is a question which at this stage in history a court is incompetent to answer. A court cannot procure the relevant evidence: some is in the hands of foreign governments, some is privileged. Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope in which foreign affairs must be allowed to the President if this country is to play a responsive role in the council of the nations.

“In short, we are faced with what has traditionally been called a ‘political question’ which is beyond the judicial power conferred by Article III of the United States Constitution. And on that ground the complaint was properly dismissed by the District Court.”

It can readily be seen that Mr. Rogers was ill-advised to quote from the Mitchell case. That he did so indicates the obvious: There is no case law, or any other law, permitting the bombing.

4. Mr. Rogers, as is the habit of Executive Department lawyers, carefully omits the concluding phrase of Article I, Section 8, Clause 18 of the Constitution. For to quote that would be an admission that Congress, clearly and indubitably, has power to make all laws “necessary and proper” both to carry out its own express powers but also “all other powers vested by the Constitution in the government of the United States or in any department or officer thereof.” Surely the President is an officer of the government and the Executive Branch a “department” under that clause. Why do Executive Branch lawyers persist in reading the part of the Constitution out of the fundamental law?

5. To maintain, as does Mr. Rogers, that the argument that the Cambodian bombing is unconstitutional, contains an automatic self-destruct mechanism designed to destroy what has been so painfully achieved” is the purest type of self-serving statement. What has been “so painfully achieved” under the Constitution is the best effort yet made by mankind anywhere to have a responsible and accountable government, operating under those external standards called law. That we are far from achieving success in meeting that ideal does not mean that we should not continue. What is at issue here is the problem of uncontrolled Executive power, accountable to no one and clouded in secrecy and efforts to bamboozle both the Congress and the public.

6. Nowhere does Mr. Rogers argue the “national interest” as a means of justifying the bombing. Could that be because it cannot be demonstrated that bombing little brown men in black pajamas is in the national interest? Would this country bomb white Europeans in this manner?

7. Mr. Rogers suggests that we are trying to ensure that “the political future of South Vietnam should be left for the South Vietnamese people to decide for themselves, free from outside interference.” Haven’t we come too far to be gulled any longer by assertions that the American interest in Vietnam is in the self-determination by the people of that country of their own government? Does Mr. Rogers consider Members of Congress to be fools and members of the public to be more than fools, completely taken in by such statements? And even if his statement is taken at face value, then are we not doing precisely what he says should not be done—interfering with the right of the South Vietnamese people to decide for themselves? Whatever the answer one gives to those questions, surely we are entitled to more from a Secretary of State than such an obviously inadequate justification of presidential authority to continue bombing. If that is all the State Department can produce, they should either fire their lawyers or stop the bombing—or both.

Conclusion

If one speaks of raw power, then the President has it; but if one speaks of legal authority, then he does not. There is no middle ground with respect to Cambodia today.

A final word: Congress can stop the President, for Congress has indubitable power to cut off funds, totally and completely, to the entire military adventure in Indo-China. It should have done so years ago. It can do so now—if it has the guts and the staying power to stare down a President who is making the most complete grab for actual power of governance in American history. I suggest, that, insofar as Cambodia is concerned, the time to stop that is now. I suggest,
further, that other exercises of excess presidential power, such as in “executive privilege” and impoundment of appropriated funds, be halted now. If allowed to continue, it will be too late—and Congress indeed will be a poor, pitiful, helpless giant as compared with the Executive.

Mr. Nix. Mr. Bingham.
Mr. Bingham. Thank you, Mr. Chairman.
Mr. Chairman, you and Mr. Hamilton have done an excellent job in questioning. At this time I appreciate the offer but in the interest of time I will ask no questions.

Mr. Nix. Mr. Ryan.
Mr. Ryan. Mr. Chairman, I have only one question of Mr. Brower, or perhaps Professor Miller.
The point that you raised last—Mr. Brower answer first.
I concur with Mr. Miller’s comment that it is less constitutional than it is simply the right of the people as a result of whatever mandate he chooses to believe he has as a result of an election. But I think that since there is such a heavy base for arguing from the legal point of view that I don’t have I would like to have Mr. Brower, if he would, give us some legal views on what he thinks he would have to advise the President if the Congress were to take any particular action which might say, “stop the bombing” or “you are in violation of the law passed by Congress.” What kind of action could the Congress take which would lead you to advise the President that he would be in violation of the law if you continued the bombing? For example, would the passage of the amendment which is up tomorrow, I believe, to withdraw the funds that have been requested for the continued action in Cambodia, force you to advise the President that he no longer has the power, in your mind? Is there any other action that the Congress could take which would lead you to advise the President that he no longer has the authority to do so?

Mr. Brower. Congressman Harrington and I were brought up in a tradition at law school that good lawyers don’t give opinions on documents they have not seen. To be precise I would have to know the circumstances and the amendment specifically involved. I am frankly not sure exactly what it is you are referring to in terms of tomorrow. Is that the question of transfer authority?

Mr. Ryan. There is an amendment which takes away the funds for the continuation of military action in Cambodia.

Mr. Brower. Well, I would simply have to see the text of it and understand it in context. Obviously, Congress has—

Mr. Ryan. Assuming it was clear enough to indicate that the Congress’ desire was not to spend money in that particular action, in that particular function. Now supposing that language is clear and it is drafted by attorneys such as yourself who are competent and so on, what would your views be?

Mr. Brower. Well, by the definition contained in your question the law is so clear it would not require interpretation by me, and that is why I say I think you have to see it—

Mr. Ryan. You mean the President could just read it and do it and you would not have to advise him?

Mr. Brower. You are posing a question which presumes a piece of legislation as to which reasonable lawyers could not differ, and if it is an open-and-shut case it is an open-and-shut case. Now I am inclined
to think that we may not be confronted with an open-and-shut case. Clearly Congress has the authority and has exercised the authority in past legislative action to place some restrictions in some circumstances on what military force can be used in what way and where, and I have cited the provision with respect to Cambodia with which the President is complying.

Now somewhere between what Congress clearly cannot do, such as interfere with the President's authority as Commander in Chief, are some areas by which there may be honest dispute. I would simply have to see what the precise provision is to give an opinion.

Mr. Ryan. Before I ask Mr. Miller to comment on what you said, may I ask if in the law—and we are confining ourselves to your role as an expert—if the role of the Commander in Chief proceeds from—I believe it is article 3 which says that the Congress should have the power to declare war.

Mr. Brower. That would be article 1, section 8.

Mr. Ryan. Yes; article 1. Right. And it says the Congress should have the power to declare war. Are there any conditions of judicial decisions or authorities or situations which you can think of which indicate that the power of the Commander in Chief comes from the power of the Congress to declare war; that until there is a war there is no Commander in Chief in any kind of military action as such?

Mr. Brower. No. In fact, I think the contrary is quite clear because the history of the debates in Philadelphia made quite clear. I think—so clear that even Professor Miller would agree with this statement—that while Congress has the power to declare war the President as Commander in Chief in the absence of the declaration of war has the power to apply those powers to resist sudden attacks on the United States.

Mr. Ryan. Attacks on the United States—I don’t think I asked that.

Mr. Brower. I understood you to ask whether the President had any authority as Commander in Chief independent of a declaration of war, and he does.

Mr. Ryan. All right.

Mr. Miller, would you comment?

Mr. Miller. I don’t think that Mr. Brower has any cases because there aren't any. Of course the President has power as Commander in Chief. It is an undefined power, it is self-defined by the President. It has to be read in connection with the two powers of Congress—one is to make rules and regulations for the Armed Forces. I take it that the Commander in Chief is a member of the Armed Forces, so there is some sort of a power there that the Congress has.

Second, the executive department lawyers also forget the second part of article 1, section 8, clause 18 that says that Congress has the power to make rules and regulations to carry out the foregoing powers, and all other powers granted by this Constitution to any department or any officer thereof. That is a paraphrase of it. They often forget it.

I heard the Deputy Attorney General speak a couple months ago. He said that if you take that literally that means that you are making the President the chief clerk. Well, my answer to that is that if you don’t take it literally, then you are reading it out of the Constitution. The powers of the President have to be read in the light of the Con-
gress' power to make all rules and laws necessary and proper to carry out all his powers. That I think is the thrust, sir, of the Supreme Court's decision in the Steel Seizure case, 20 or 21 years ago, when the Court struck down President Truman's seizure of the steel mills. Chief Justice Vinson used almost the same language. He said, "You are making the President a messenger boy." The Supreme Court didn't worry about that. He is not a messenger boy; he has a lot of powers. But, it is a shared power. What this President and previous Presidents want, and particularly in modern times, is government by executive fiat, by executive decree, and that I think is an intolerable situation under the American Constitution.

Mr. Ryan. That is all I have, Mr. Chairman.

Mr. Riegle. Thank you, Mr. Chairman.

Mr. Hummel, as I reconstruct some of the testimony earlier it seemed to me that the legal arguments that the administrative representatives presented, while I do not agree with, but on that basis, it seems that it is North Vietnamese participation in Cambodia that we are striking against. In other words it is their involvement in Cambodia that has caused the bombing. Am I correct on that point, that it is not really native Cambodian insurgents that we are trying to blow out of existence, it is that part of the force on the ground which is North Vietnamese.

Mr. Hummel. That is the major factor, yes.

Mr. Riegle. Well, I mean I would assume that we would stop bombing if that factor were gone. Is that incorrect?

Mr. Doolin. Mr. Riegle, if I may on that point, if the North Vietnamese were not involved in terms of cadres, weapons support, the insurgency would be well within the means of the Republic to handle and I think we would have negotiations on the cease-fire.

Mr. Riegle. You may be correct. There is no way we can know that before the fact. In other words there is no proof of that.

Mr. Doolin. We do know that the Khmer insurgents and Communists do not have an indigenous military capability that is anything near that which is required to carry out the present insurgency.

Mr. Riegle. So what you are saying then, that is your belief. If the North Vietnamese were to withdraw and we were to find that the insurgents were able to continue on their own, is it likely that we would bomb?

Mr. Doolin. I would say under article 20 then it would be left for the Khmer parties to work out among themselves.

Mr. Riegle. Then you are saying it is the policy of this administration to bomb or is it not clear?

Mr. Doolin. I think it is quite clear.

Mr. Riegle. Do you think it is clear, Mr. Hummel, that we would not bomb in that case?

Mr. Hummel. I believe that to be the case, right.

Mr. Riegle. Then that seems to say that the North Vietnamese are really the problem, and if they are the problem it might be possible to extend the rationale that you have offered us. We might resume the bombing of North Vietnam because clearly the manpower and resources are coming from North Vietnam? Is this right?
Mr. Hummel. The President has addressed this subject and other administration spokesmen have also addressed it. The language they have used is that we cannot tolerate idly the North Vietnamese activities that might destroy this fragile peace throughout Vietnam. They have not said specifically what actions might be taken.

Mr. Riegle. So the threat of bombing North Vietnam is clearly there and whether we exercise it or not I conclude from what you have said that you are putting them on notice that there is that kind of jeopardy if they continue to be involved in Cambodia.

Mr. Hummel. Administration officials have not used the word "threat" but a good many other commentators have used the language that you have used.

Mr. Riegle. So there is the possibility that we may bomb Vietnam again? There is that possibility?

Mr. Hummel. I cannot speak to that possibility at my level in the Government, Mr. Congressman.

Mr. Riegle. So we can rule it out?

Mr. Hummel. I would say it could not be ruled out.

Mr. Riegle. So it is a possibility? In other words if you are not prepared to rule it out, it seems like we have to talk to each other from behind these screens and that is unfortunate. But as long as you are not prepared to rule it out, and obviously the tone of that Presidential statement that you referred to is threatening, there is the possibility that we may start bombing North Vietnam again.

Mr. Hummel. I am not prepared, Mr. Congressman, to push the language that administration officials have used beyond what they have in fact used, and you are asking me to draw inferences.

Mr. Riegle. Our job is to push it.

Mr. Hummel. You are asking me to draw inferences that frankly I am not authorized to draw in public session.

Mr. Riegle. Let me tell you what I conclude from what you have said thus far and that is we would consider bombing North Vietnam and using the same justification that you have given us for the President to make those kinds of unilateral decisions—to bomb where he wants and when he wants.

If it were later to develop that what we were bombing in the way of supplies in North Vietnam were supplies that originated some other place, namely the Soviet Union or mainland China which is where a good part of these supplies have come from, then you could extend that same argument to say that the President could move right back up that pipeline and bomb there if he should ever reach that point of personal judgment. I might not agree with it and you might not agree with it and no one in the United States might agree with it but if he should decide that on his own then he is authorized to bomb those countries.

What I want to know is this. Based on what you have said today, does not the President of the United States have, according to your legal brief, the right to decide to bomb the Soviet Union tomorrow morning? I mean isn't that the logical extent because if it is not then tell me it is not.

Mr. Brower. That depends what the circumstances are tomorrow morning.

Mr. Riegle. That is exactly right. So you cannot tell me it does not mean that.
Mr. Brower. I think the point is that and I think it is misleading to dwell on the word "possible". I think you have to determine what is possible. Legally it is an option that is open to the President of the United States to bomb North Vietnam. Now that is a legal fact whether you or someone else judges it as possible, he is going to do it as an individual judgment factor.

Mr. Riegle. That is very important and I am glad you put it that way. You volunteered that according to administration doctrine the President does have the legal authority to bomb North Vietnam. Does he at the same time have the legal authority then to bomb any other place? Can he bomb the Soviet Union?

Mr. Brower. That depends upon the circumstances at the time. I can answer the question with respect to North Vietnam because we are familiar with the concrete legal and factual situation with which we are dealing. Now you suggest that the President unilaterally is going to decide that, or decided that.

Mr. Riegle. No, I am not suggesting that at all. What I am asking you is the extent of the legal justification that you presented us. How broad, how far does it extend? What you volunteered to say to us is that the President today has the legal right to bomb North Vietnam if he should make the decision to do so. I am willing to then conclude in my own mind that if he were to decide that the Soviet Union was guilty of the same misbehavior or misconduct that he might find North Vietnam, or in this case Cambodia guilty of that and he would then feel as if he had the legal basis to bomb in the Soviet Union. If that does not follow, then I would like to hear why it does not.

Mr. Brower. We are dealing with entirely different situations, and you have to deal on a case basis. It is not necessarily what I concluded with respect to North Vietnam. The study ordered by the Committee on Foreign Relations across the way, and prepared by the Library of Congress, explicitly says that there is no bar to the President authorizing bombing in North Vietnam or Laos. That is just a fact with which people seem to agree.

Mr. Riegle. What I am saying is that that legal basis you presented to us is a justification for the President to bomb anywhere.

Mr. Brower. No, that is not the case. Exactly the point I am trying to make is the opposite. You have a finite concrete situation in Indochina where there is a very specific and elaborate agreement in effect to which North Vietnam is a party as well as the United States. I am saying under the whole complex of this situation the Library of Congress has apparently concluded, and I concur, that it would not be a bar to the President should violations by North Vietnam of the agreement of January 27 warrant bombing North Vietnam. Notice I don't say he is going to do it, nobody said he is going to do it. I simply said as a legal faction it is an option, it is up to you and the others to determine what is possible.

Mr. Riegle. I think we discussed this point as much as is useful, so let me raise a separate question. One of the things that deeply concerns me is the quality and accuracy of the President's information on what is actually happening in Cambodia and Indochina. I am not making this point to relate it to Watergate, but I think there is an obvious relationship here and that is that the difficulty any President has—whether it is Johnson or prior Presidents, or future Presidents,
to get good, accurate, complete, valid, up-to-date information. There is no case that I am familiar with in the history of the country where a President was so successfully kept in the dark about activities undertaken by people closest to his administration.

If I think then about information flow and the extent to which the President may or may not be well informed as to what is going on, and I transfer that to the situation in Southeast Asia, it is very easy for me to see how difficult it is for a President to be certain that he has accurately balanced information from the field.

I have been out there. I suspect you have been out there trying to assemble a coherent summary of where things stand at any point in time. It is very difficult. We suddenly realized for example that bombing was being done in North Vietnam that the President didn't authorize, and didn't even know about. So we have specific cases where the President himself didn't know what was going on in Indochina.

What I want to know is how can we be sure that the flow of information from Indochina and the basis on which these decisions are being made is better 10,000 miles away than it is in the case of everything we are seeing related to Watergate, which involved people that you know in the next office. Quite apart from whether you want to argue about the power of one man to bomb or not is the question whether that man has any reasonable chance of getting competent information upon which to base that decision. I am deeply concerned as to whether that kind of information exists.

What assurances can you give the subcommittee that the information that is coming in is complete and accurate thus enabling those kinds of judgments?

Mr. DOOLIN. Mr. Riegle, if I may on that point, the hard information that we receive on the situation in Cambodia is, to be perfectly candid, not as complete as we would wish. This is due to a number of factors, one being the fact that we have relatively few people in the country. Now our attaches do travel, they do provide information, but parts of that country, as you are well aware, are denied to all friendly forces, and the Cambodians themselves do not have as complete information as they would wish on activities for example in the northeast.

I think one example of the judicious application of our air effort in Cambodia is the fact that we are turning down approximately 40 percent of the requests that we receive that are validated by the Cambodian general staff. On this point, Mr. Chairman, if I may, if the session is going to run short today, I would be pleased on behalf of the Department of Defense to appear at your convenience and answer any further questions on our activities there and counter what I consider to be an unwarranted slur on the part of Mr. Miller that we are indiscriminately bombing yellow men in black pajamas.

Mr. MILLER. Brown.

Mr. DOOLIN. It is just not true.

Mr. NIX. May I say this to the request you made. Unquestionably you will be accorded the opportunity to come in and offer such testimony as you deem to be ordered. It was the intention of the Chair to recess this subcommittee subject to the call of the Chair, and I think contact your department and ask you to return Wednesday of the coming week at 2 o'clock.
Mr. DOOLIN. Thank you, Mr. Chairman.
Mr. NIX. Would that be agreeable?
Mr. DOOLIN. Yes.
Mr. NIX. Thank you.
Mr. RIEGLE. Are we adjourned or about to adjourn?
Mr. NIX. We are hoping to do so, so that we may answer this quorum call.
Mr. RIEGLE. Might I make one request for data that the witness would bring back with them when they come, and that is the complete record of all American personnel or American financed personnel that are involved in this conflict. This should cover everyone in Cambodia, whether they are Cambodians, Cambodian nationals, third country nationals, or operatives from outside the confines of Cambodia. In other words, who is involved in these bombing runs, and where are they coming from?

I think one of the difficulties we have here in trying to exercise any kind of partnership role is to understand who is there.

Are they CIA people? When you say that we turn down 50 percent of the requested bombing runs, what is the basis of that information source? Obviously we have people somewhere that we use as a cross-check. How many? Where are they located?

Mr. DOOLIN. Mr. Riegel, I appeared before the House Armed Services Committee on Mr. Leggett's privileged resolution in which he submitted 19 questions asking for information on our activities in Cambodia and Laos in some great detail. We answered every question completely in open session. I understand that a print of that transcript will be available to all Members of the Congress before the vote tomorrow. I think that will answer your question to your satisfaction.

Mr. RIEGLE. Thank you, Mr. Chairman.
Mr. NIX. Thank you.

Mr. Harrington very much desires asking a great number of questions. Unfortunately, the time has run out on us. I will, of course, get in touch with the witnesses to the end of having a meeting on the day and time indicated a moment ago. So at this time the meeting is recessed subject to the call of the Chair.

Thank you gentlemen.

[Whereupon, at 12:18 p.m. the subcommittee adjourned, subject to the call of the Chair.]
The subcommittee met at 10:30 a.m. in room 2255, Rayburn House Office Building, Hon. Robert N. C. Nix (chairman of the subcommittee) presiding.

Mr. Nix. The subcommittee will come to order.

Now the subject matter is the same—the situation in Cambodia.

Yesterday we heard from State Department and Defense Department witnesses as to the President's constitutional authority to conduct bombing raids in Cambodia. It is their position that the President as Commander in Chief and the Chief Executive Officer of the Government has the power to decide what is required in the matter of national defense, including Cambodia, with Congress having the right to enact legislation restricting such activity.

We will hear from witnesses today who agree with that point of view and those who do not.

Next week we will have the same team of Government witnesses back for further questioning since our hearing yesterday was cut short by the Democratic caucus. There were members who would have liked to ask further questions. We also have not had the opportunity to question representatives of the Agency for International Development. There will be questions for Mr. Dillon who represented the Office of International Security Affairs of the Defense Department. Our hearing will be held on Thursday afternoon, May 17, 1973, at 2 o'clock in room 200, Rayburn Building.

Now I want to particularly welcome and express our deep appreciation to Senator Goldwater for being here today.

You may proceed, sir.

STATEMENT OF HON. BARRY GOLDWATER, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator Goldwater. Thank you very much, Mr. Chairman. I want to thank you for this courtesy; it is one that has not been extended to me by the Senate committee so I am hopeful that your good example might excite Mr. Fulbright to the point where he would invite a fraternity brother to talk.

1 Subsequent to this appearance Senator Goldwater submitted a letter in response to testimony which follows. The letter may be found at the end of this day's hearing (see p. 82).
Mr. Chairman, a little background on this. When I decided to run for the presidency I began to look into the duties of the President and I was most taken by the war powers given that office by the Constitution. It disturbed me because frankly I questioned whether one man should have that, but I came to the conclusion that that is the way it was written and that is the way it would remain until the American people might decide to make a constitutional amendment providing that there was some other way to approach it. I have spent the last 8 or 9 years studying this and my legal assistant, Mr. Terry Emerson, has done most of the basic research and is very well rounded in this.

1. THE INEFFECTIVENESS OF CONGRESS ACTING AS AN EXECUTIVE

A. Washington's troubles with the Continental Congress

Mr. Chairman, on June 20, 1775, George Washington received his commission as General and Commander in Chief of the Continental Army. From that day forward, it was a constant struggle for Washington to overcome the obstacles put in his way by Congress.

Required by his commission—punctually to observe any such orders and directions—as he should receive from Congress, then clothed with the powers of an executive, Washington was harassed, second-guessed and overruled on his military plans and strategy throughout the War of Independence.

It was Congress who persisted in continuing an unwise American invasion of Canada long after the project was doomed to disaster; it was Congress who ordered that Manhattan Island must be defended to the last, after Washington had instructed its evacuation, and thereby caused the useless surrender of 2,000 American troops; it was Congress who first established the Army upon a hapless system of local militia who came and went every month rather than furnishing Washington with a permanent force.

It was Congress who appointed Gates, recently exposed for plotting against Washington, as commander for the Southern Department instead of Greene, who was Washington's first choice. The result was an immediate disaster. In his very first battle, Gates lost the entire American Army in the South.

And, yes, it is Congress who must be held accountable for that tragedy of Valley Forge. In August of 1777, Congress threw out a military commissary general chosen by Washington and itself assumed complete charge of the commissariat. Separated from the military organization of the Army, the commissary department suffered a total breakdown. The entire want of clothing, food, and blankets grew into tragedy as the cold weather came on. A prominent military historian has written:

"The amount of harm caused by the unwise military control usurped by Congress, can only be measured in terms of the appalling sufferings of the American soldiers at Valley Forge, which Washington was powerless to prevent (T. Frothingham, Washington Commander in Chief 234 (1930))."

There are some in Congress today who would have us revert to this discredited system. They propose that Congress shall dictate when and where, for what reasons and for how long, the United States can wage military operations. They would control by legislation how many...
American troops can be stationed in particular areas of the world, and even when United States forces shall withdraw from ongoing hostilities.

B. The framers intended to prevent a recurrence of the interference
Washington experienced

But, Mr. Chairman, this is exactly the system which very nearly led to disaster during the Revolutionary War. For that reason it was repudiated by the Constitutional Convention. The Founding Fathers had witnessed at first hand the inefficiency of the legislature interfering with military operations. They made up their minds that the new Government which they formed would have a Commander in Chief who possessed real power.

This explains why they designated the President to be Commander in Chief. By this decision, Charles Evans Hughes wrote, the framers planned to create—

A union which could fight with the strength of one people, under one government intrusted with the common defense. The prosecution of war demands in the highest degree the promptness, directness, and unity of action in military operations which alone can proceed from the executive (Hughes, War Powers Under the Constitution, 55 Cent. L. J. 206, 209 (1917)).

Thus, did one of the great Chief Justices echo the words of Alexander Hamilton, who wrote in the Federalist Paper No. 73, that—

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of executive authority.

Therefore, I contend that efforts by some in Congress to seize the function of military command into the legislative branch runs counter to the division of powers planned by the Founding Fathers. If this committee should seek to order the end of all air combat operations in Cambodia, it would nullify the purpose of the Framers to place the direction of war into a single hand, the constitutional Commander in Chief.

II. THE MAJORITY OF AUTHORITIES AGREE THE PRESIDENT IS CHARGED WITH PRIMARY RESPONSIBILITY FOR THE NATION’S SAFETY

Mr. Chairman, constitutional authorities throughout our history have been almost unanimous in concluding that the President is vested with an independent control and direction over the military forces in all situations where he believes there is a threat to our country or its freedoms. The notion that the President is subject to the policy directives of Congress has been rejected by leading jurists time and again. It is only during the last decade or so, after the going got tough in Vietnam, that constitutional revisionists began changing their minds.

In the famous book which first formulated the war powers of this country, William Whiting wrote:

Congress may effectively control the military power by refusing to vote supplies, or to raise troops, and by impeachment of the President; but for the military movements and measures essential to overcome the enemy—for the general conduct of the war—the President is responsible to and controlled by
no other department of government (W. Whiting, The War Powers of the President 82 (2d ed. 1862)).

As if in anticipation of the legislation now before the committee, Whiting added that the Constitution "does not prescribe any territorial limits, within the United States, to which his military operations shall be restricted." Id. at 83.

Dr. John Pomeroy, dean of the University of New York Law School, emphatically rejected the idea that "the disposition and management of the land and naval forces would be in the hands of Congress." The policy of the Constitution is very different," Pomeroy instructs. The legislature may "furnish the requisite supplies of money and materials" and "authorize the raising of men" but "all direct management of warlike operations * * * are as much beyond the jurisdiction of the legislature, as they are beyond that of any assemblage of private citizens." J. Pomeroy, An Introduction to the Constitutional Law of the United States 288, 289 (1876).

Prof. Clarence Berdahl, who published a comprehensive study on the Executive's war powers in 1921, squarely tackled this issue. He concluded:

Although there has been some contention that Congress, by virtue of its power to declare war and to provide for the support of the Armed Forces, is a superior body, and the President, as Commander in Chief, is "but the executive arm * * * in every detail and particular, subject to the commands of the lawmaking power," practically all authorities agree that the President, as Commander in Chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments (C. Berdahl, War Powers of the Executive in the United States 116, 117 (1921)).

Professor Willoughby, author of a famous multivolume study on constitutional law, agreed with this position. He wrote that the power of the President to commit troops outside the country "as a means of preserving or advancing the foreign interests or relations of the United States" is a "discretionary right constitutionally vested in him, and, therefore, not subject to congressional control." J. Willoughby, The Constitutional Law of the United States 1567 (2d ed. 1929).

Mr. Chairman, there are many other legal scholars whom I could cite as having reached identical findings. The same theme of Presidential responsibility for the Nation’s safety runs through 180 years of legal writings. I might just indicate here that though the question has never been squarely resolved by the Supreme Court, which treats the issue as a "political question" outside the competency of the judiciary, four members of the High Court have declared a concurring opinion that "Congress cannot direct the conduct of (military) campaigns * * * Ex parte Milligan, 71 U.S. 2, 159 (1866). Later, the Supreme Court affirmed a holding by the Court of Claims that "Congress cannot in the disguise of 'rules for the Government' of the Army impair the authority of the President as Commander in Chief." Swaim v. United States, 28 Ct. Cl. 173, 221 (1893), aff’d, 165 U.S. 533 (1897). The Court also has broadly stated that the Commander in Chief provision confers upon the President "such supreme and undivided command as would be necessary to the prosecution of a successful war." [Emphasis added.] United States v. Sweeney, 157 U.S. 231, 234 (1895).

Are we now to cast this aside as if it were never written? Rather, I should think, the weight of authorities in support of Presidential
prerogatives would place the burden of proof on the other side. Instead of confining the subject of these hearings to the authority of the President to continue the bombing in Cambodia, I would suggest that a very proper subject of investigation would be a detailed analysis of what the authority of the Congress is to stop that bombing.

III. THE PRESIDENT, ACTING TO DEFEND AMERICA'S INTERESTS, IS NOT SUBJECT TO THE COMMANDS OF CONGRESS

A. The declaration of war power is not the exclusive way the United States can wage war

Certainly, the declaration of war clause gives us no such power. The idea that the only way this Nation can enter into war is through a declaration by Congress is a myth. The vast majority of wars are begun without any declaration. This was as well known to the Founding Fathers as it is to us today.

In the 87 years preceding the Constitutional Convention, 38 wars were held in the Western World and only one of them was preceded by a declaration. Maurice, "Hostilities Without Declaration of War 12-27" (1883). That the Founders knew of this condition is proven by Hamilton's statement in the Federalist No. 25 that declarations of war were already in disuse in the 18th century.

Thus, there is no question that when the Constitutional Convention narrowed the authority of Congress by substituting "declare" for "make" in the declaration of war clause, the Framers understood that there had been and might continue to be many instances in which hostilities would occur with no declaration. To argue that no military operations can begin without a declaration by Congress is to ignore the historical setting in which the Constitution was drafted, and, indeed, is to ignore the ensuing 184 years of life under that document.

It may come as a surprise to many Americans, but there have been around 200 foreign military hostilities in the history of our Republic and only five of them were declared. These incidents show a consistent practice by which American Presidents have responded to foreign threats with whatever force they believed was necessary and technologically available at the particular moment.

The incidents have not been limited to the Western Hemisphere or to small-scale skirmishes. At least 103 of them took place outside this hemisphere, and 53 of these occurred in the 18th and 19th centuries. One of them, the Philippine Insurrection, involved the employment of over 126,000 U.S. troops in a war begun and ended without any declaration of war.

These practices form an impressive source of constitutional interpretation of a kind which has real meaning in the courts. In fact, the principle of usage has been accepted by the Supreme Court as a determining factor in constitutional interpretation. For example, in United States v. Midwest Oil Co., 236 U.S. 459 (1915), the Court approved the validity of a long-continued practice of the President to withdraw public land from private acquisition, even though this conflicted with a contrary act of Congress. That practice fixed the construction, the Court explained:

Is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall
be given to the usage itself—even when the validity of the practice is the subject of investigation (Id., at 472, 473 (emphasis added)).

A decade later the Court again relied on usage as a basis for rejecting congressional control over the Presidency. In holding that Congress could not shift gears after 73 years of practice and set conditions on the removal by the President of executive officers, even though such practice had often been the subject of bitter controversy, the Court argued:

Nor can we concur * * * that when Congress, after full consideration and with the acquiescence and long practice of all the branches of the Government, has established the construction of the Constitution, it may by its mere subsequent legislation reverse such construction. It is not given power by itself thus to amend the Constitution (Myers v. United States, 272 U.S. 52, 175, (1926)).

Now, Mr. Chairman, these two cases closely parallel debate over the military command powers. Here there are over a hundred years of practice in which Presidents have reacted on their own initiative to any crisis which they believed might present, or might develop into, an unacceptable threat against our national security. Many Presidents have been denounced and condemned from the floor of both Houses for taking these strong military actions. But Congress has never once passed a law blocking or ordering a halt to any of these conflicts. Congress cannot now, in my opinion, after full consideration and acquiescence during almost two centuries, reverse the construction of the Constitution which has become so firmly set.

To those who fear this concept may give an unrestrained power to the President to do anything he wants, I would remind them that I am speaking only of defensive actions by the Executive. The President cannot conduct a war of aggression. He cannot bully another country with threats of armed action simply because we do not like its tariff policies or the way it governs its internal affairs. His constitutional power of independent action is limited to the defense of our country, its citizens, and its freedoms; but he may act whenever and wherever in his judgment a danger exists, imminently or prospectively, which compels a response on our part.

B. Congress cannot pass laws under the "necessary and proper clause" which interfere with or limit the President's power as Commander in Chief

Now can Congress act to restrain Presidential military operations under the guise of the "necessary and proper" clause of article I. This notion was considered and rejected over 100 years ago when Whiting counseled President Lincoln that Congress is "bound to pass such laws as will aid him" in carrying into execution his military powers. Thus, congressional measures under the "necessary and proper" clause must be supplementary to and in aid of, the functions of the President as Commander in Chief; they cannot restrict his exercise of those functions.

That this is the correct interpretation of the Constitution is clear from the decision of the Supreme Court in Myers v. United States, 272 U.S. 52 (1926), where the Court held that Congress could not limit the President's discretion of removal of executive officers even though Congress itself created those offices. Chief Justice Taft, writing for the Court, emphasized that Congress cannot vary the exer-
cise of the President's separate powers. This, he said, “would be a
delegation by the (Constitutional) Convention to Congress of the
function of defining the primary boundaries of another of the three
great divisions of government.” Id., at 127.

The Court also took a restrictive view of the necessary and proper
the clause “is not a grant of power,” but merely removes uncertainty
that Congress may implement the powers otherwise vested by the
Constitution.

C. Congress cannot pass appropriation restrictions which limit the
President’s legal power as Commander in Chief

Neither can Congress use its power of the purse to legislate policy
restrictions over the conduct of the President’s defense powers. This
would be placing “the keys of the Treasury and the command of the
Army into the same hands,” something that Madison rejected in the
Federalist Paper No. 37 as being “particularly dangerous” and there­
fore unintended by the Constitutional Convention.

Congress has great powers over military matters. It controls the
size and the strength of the Armed Forces and the amounts and kinds
of materials with which we can wage war. Congress can enact or refuse
a multitude of emergency powers involving foreign trade and stra­
tegic materials. Congress can approve or reject treaties or area resolu­
tions having defense implications. If the President undertakes a truly
disastrous course, he can be impeached.

But once Congress has made its decisions of how many men shall be
enlisted, or what arms constructed, the President may station those
forces and send out those arms to such parts of the world as he deter­
mines appropriate in the national defense. The Constitution gives the
President the authority to protect American rights and interests
abroad and Congress cannot by mere legislation redefine the allotment
of powers made by the Framers.

The applicable rule is stated in 41 Opinions of Attorneys General
230, 233 (1955), which took the position that a rider attached to the
Department of Defense Appropriation Act, 1956, “serves to usurp
power confided to the executive branch.”

Congress may, the Opinion concluded, “impose conditions with re­
spect to the use of the appropriation, provided always that the con­
ditions do not require operation of the Government in a way forbidden
by the Constitution. If the practice of attaching invalid conditions to
legislative enactments were permissible, it is evident that the consti­
tutional system of the separability of the branches of Government
would be placed in the gravest jeopardy.” Id.

Here, I think it is important to note that at least six justices of
the current Supreme Court recognize the primacy of the President in
the field of national defense and foreign affairs.

Justice Stewart and Justice White have commented that the Con­
stitution endows the President with “a large degree of unshared power
in the conduct of foreign affairs and the maintenance of our national
(1971). To which Justice Marshall added, “it is beyond cavil that the
President has broad powers by virtue of his primary responsibility for